CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1927

B. B. PALMER ET AL. v. NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 31 January, 1928.)

Eminent Domain — Proceedings to Assess Compensation — Evidence of Value.

When the value of a building used as a store, and taken by the State Highway Commission in the construction of its highway, is to be determined in an action against it, the rental value of the building is competent upon the question of the fair market values at the time of the taking, and while the purchase price of the land eighteen years before would ordinarily be too remote to be competent evidence, it is otherwise on cross-examination when the plaintiff himself has testified as to its value to test the accuracy of his opinion thereof, and to show the basis of the opinion.

CIVIL ACTION, before *Stack, J.*, at April Term, 1927, of CHEROKEE.

The plaintiffs instituted an action against the defendant for damages for the taking of land upon which there was a store building. The property was taken by the defendant in the construction of a highway. Appraisers were duly appointed, who assessed the damages sustained by plaintiffs. From the judgment rendered by the clerk both parties appealed to the Superior Court. In the Superior Court an issue of damages was submitted to the jury and the verdict of the jury awarded damages in the sum of $875. From judgment upon the verdict the petitioners appealed.

J. D. Mallonee and Moody & Moody for plaintiffs.
Charles Ross for defendant.

BROGDEN, J. The cause presents in the main only issues of fact which the jury has determined. The main item of damage claimed by the plaintiffs was the destruction of a store building. The store building had never been rented out, but the sons of plaintiffs used the building for mercantile purposes with the understanding that the plaintiffs were to have their supplies at wholesale price in lieu of a stipulated rental. On cross-examination the plaintiff was asked whether or not the business had been prosperous. The plaintiff objected to this question and answer, and excepted to the action of the trial judge in permitting the evidence. This exception cannot be sustained. Rental value of property is competent upon the question of the fair market value of property at the time of the taking. *Brown v. Power Co.,* 140 N. C., 333. If the plaintiffs were to receive a part of the stock of merchandise in lieu of rental, the amount of stock carried or the volume of business would be a circumstance to be considered by the jury in determining what return the plaintiffs were receiving for the property at the time of taking. Plaintiffs further testified on cross-examination that they did not build the building upon the premises; that the building was upon the land at the time they purchased it, about eighteen years ago. Thereupon, the defendant asked the witness what the purchase price was for the entire property. Plaintiff objected to this question. The objection was overruled, and plaintiffs testified that the purchase price was $1,000, but that they had purchased it eighteen years ago. It is accepted law that when land is taken in the exercise of eminent domain it is competent, as evidence of market value, to show the price at which it was bought if the sale was voluntary and not too remote in point of time. *R. R. v. Church,* 104 N. C., 525; *R. R. v. Mfg. Co.,* 169 N. C., 156. Certainly the value of property eighteen years before the taking, nothing else appearing, would be incompetent, but upon the present record it appears that the plaintiffs had testified that they had owned the property for eighteen years, and that the building was then upon the property. The plaintiffs had further testified that at the time of the taking the property was worth $3,000. It was therefore permissible on cross-examination to test the accuracy of the opinion of the witness as to the value of the property as well as to demonstrate the basis of his opinion as to the value thereof. A careful perusal of the record and briefs convinces us that the case has been fairly tried, and the judgment is affirmed.

No error.

RALPH ROSENBERG v. THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed 31 January, 1928.)

Appeal and Error—Review—Questions of Fact Reviewable in Contempt Proceedings.

When in an appeal the Supreme Court has decided that a defendant life insurance company deliver to the plaintiff a certain kind of its policies as of a certain date, and the former in its motion as for contempt of court, contends that the defendant had not complied with the court's opinion in delivering the kind of policy designated, the judgment of the lower court will be reviewed which ordered judgment upholding plaintiff's motion in direct conflict with all the evidence introduced upon the hearing.

APPEAL by defendant from judgment of *Shaw, J.*, at June Term, 1927, of BUNCOMBE. Reversed.

Motion in the above-entitled action that defendant show cause why it should not be required to issue and deliver to plaintiff a policy of life insurance in accordance with the provisions of the judgment hereinbefore rendered, or otherwise be attached for contempt. Defendant, answering the motion, alleged that it had tendered to plaintiff a policy of insurance in accordance with the provisions of said judgment, and prayed that the motion be dismissed.

The court was of the opinion that the policy tendered by defendant to plaintiff was not in compliance with the judgment. It thereupon ordered, adjudged and decreed that defendant issue and deliver to plaintiff a policy as directed in said judgment, and that upon its failure or refusal to do so, it should be adjudged in contempt and punished accordingly.

From said order and judgment defendant appealed to the Supreme Court.

Merrick, Barnard & Heazel for plaintiff.
Bourne, Parker & Jones for defendant.

CONNOR, J. The only question presented for decision by this appeal, as stated in the brief of counsel for appellant, is as follows: Does the policy of insurance tendered by defendant to plaintiff, with the permanent disability clause contained therein, fully comply with the provisions of the judgment hereinbefore rendered at September Term, 1926, of the Superior Court of Buncombe County, and affirmed on defendant's appeal to this Court at Fall Term, 1926? This judgment is set out in full in the opinion filed on 26 January, 1927. See 193 N. C., 126.

The only provision in said policy, with respect to which plaintiff contends that same does not comply with said judgment, is that with respect to the benefits to be granted by defendant to plaintiff, by virtue of the permanent disability clause. There is no contention that in other respects the said policy is not in full compliance with the provisions of said judgment.

In the judgment, with respect to the permanent disability clause, it is ordered, adjudged and decreed that defendant issue and deliver to plaintiff a policy of life insurance, to be dated 15 November, 1925, containing a permanent disability clause "in accordance with the terms of such clauses as are usually and ordinarily inserted in policies of like character issued by defendant." It is further ordered that "said policy shall provide for the payment of premiums, semiannually, as of 15 November and 15 May of each year, at the established premium rate fixed by said defendant in its regular schedule of premium rates on ordinary life plan policies containing such clauses for persons of the age of thirty-seven."

The permanent disability clause contained in the policy tendered by defendant to plaintiff is as follows:

"Disability benefits before age 60 shall be effective upon receipt of due proof, before default in the payment of premium, that the insured became totally and permanently disabled by bodily injury or disease after this policy became effective and before its anniversary upon which insured's age at nearest birthday is 60 years, in which event the Society will grant the following benefits:

"(a) Waive payment of all premiums payable upon this policy falling due after the receipt of such proof and during the continuance of such total and permanent disability; and

"(b) Pay to the insured a monthly disability-annuity as stated on the face hereof; the first payment to be payable upon the receipt of due proof of such disability, and subsequent payments monthly thereafter during the continuance of such total and permanent disability."

By virtue of the judgment hereinbefore rendered, plaintiff is entitled to, and defendant is ordered to issue and deliver, in exchange for the term policies dated 15 August, 1919, a policy of insurance on plaintiff's life, to be dated 15 November, 1925, containing a permanent disability clause "in accordance with the terms of such clauses as are usually and ordinarily inserted in policies of like character issued by defendant." Two affidavits, signed by officers of defendant, were filed upon the hearing, as evidence, both to the effect that the permanent disability clause contained in the policy tendered to plaintiff by defendant is "exactly in the form ordinarily and usually issued by defendant on 15 November,

1925, and for some years prior thereto and ever since said date." There was no evidence to the contrary.

By virtue of the judgment aforesaid, plaintiff is required to pay to defendant premiums on the policy to be issued and delivered to him, from and after 15 November, 1925, for the protection afforded him by said policy and all its terms and provisions. He was not required to pay, nor does he offer to pay for such protection prior to the date of the policy, and subsequent to the date of the term policies. There is no provision in the judgment which requires defendant to afford protection to plaintiff for which he has not paid. Whether the policy to be dated 15 November, 1925, is a new and independent contract, or whether it is a continuance of the contract evidenced by the term policies, with respect to the protection afforded by said term policies, is not determinative of the question presented for decision by this appeal. Plaintiff had no protection for permanent disability under the term policies; he is entitled to such protection by defendant only under the policy to be dated 15 November, 1925. For this protection he is required by the judgment to pay in accordance with the premium rate of defendant fixed by its schedule for the age of 37.

There was error in holding that the policy tendered to plaintiff by defendant was not in accordance and does not comply with the judgment hereinbefore rendered. The order and judgment in accordance with this holding is

Reversed.

W. H. PORTER v. PERRY M. ALEXANDER, J. E. PATTON, AND NATIONAL SURETY COMPANY.

(Filed 31 January, 1928.)

1. Trover and Conversion—Acts Constituting Conversion—Persons Liable.

When the plaintiff was a subcontractor for the building of a State highway, and on abandonment of the principal contractor of the work, the plaintiff's property or materials has been sold with that of the original contractor, and the proceeds applied to the completion of the work by the surety on the contractor's bond, an action of conversion will lie, and the value of the plaintiff's property thus sold may be recovered against the surety on the bond of the original contractor.

2. Trover and Conversion—Acts Constituting Conversion.

Where in an action of conversion, the plaintiff's property has been taken and converted by the defendant, and converted into money and used by it, it is not required that a demand for its value should have been made before the commencement of the action.

3. Same.

The taking of the property of another, and in denial of his title, retaining possession and claiming and exercising the right of ownership is a wrongful conversion, upon which an action will lie.

APPEAL by National Surety Company from *Harding, J.* From HAYWOOD. Affirmed.

The plaintiff was engaged in the construction of a State highway in Haywood County as a subcontractor of the defendants Alexander & Patton; and in March, 1923, he left with them his equipment, scrapes, machinery, and other articles. In June he went home, and upon his return found that Alexander & Patton had abandoned their contract with the State Highway Commission, and that certain of their property, together with his machinery and equipment, were in the custody of Nelson Moore, who held it as the agent of the National Surety Company, against whom the action was prosecuted for conversion.

The cause was referred by consent, and the referee found as facts: (1) That the plaintiff was the owner of certain road-grading equipment, consisting of various implements, etc., of the value of $431.50, which the National Surety Company had taken into its possession; (2) that all this property, with equipment belonging to Alexander & Patton, had been sold either by the National Surety Company (surety on the bond of Alexander & Patton) or by the State Highway Commission, and that the proceeds had been used in connection with the completion of the highway, the Surety Company being obligated under its bond to complete the work upon failure of the bonded contractor, and that the National Surety Company had directly or indirectly received the benefit of the proceeds of the plaintiff's property; (3) that the value of the plaintiff's property, which had been sold, was $431.50.

Upon these facts the referee concluded as a matter of law: (1) That the National Surety Company having received the benefit of the proceeds of the sale of the plaintiff's property, and having thus been relieved of liability to the extent of the amount received for said property, the plaintiff was entitled to have settlement for said property at its reasonable market value at the time it was taken over and sold; (2) that the value having been determined to be $431.50, the plaintiff is entitled to judgment for this item.

The Surety Company filed exceptions, the report was confirmed, and judgment rendered for the plaintiff, from which the defendant appealed upon error assigned in its exceptions.

Rollins & Smathers for plaintiff.

Mark W. Brown for National Surety Company.

ADAMS, J. The appellant excepted to the court's refusal to dismiss the action as in case of nonsuit, assigning as ground for its exception the lack of evidence to show its conversion of the plaintiff's property. Granting the plaintiff, in accordance with the accepted rule, all inferences that may reasonably be drawn from the evidence, we are of opinion that the exception should not be sustained.

The law of conversion was developed through the common-law action of trover, which was applicable to cases in which the plaintiff had lost goods that were afterwards found and appropriated by the defendant. The referee found in effect that the sale was made by the defendant or by the State Highway Commission for its benefit; but conversion of the plaintiff's property was not necessarily dependent on the alleged sale. The basis of the action is the loss to the plaintiff, and such loss may be caused by the defendant's wrongful assumption of dominion over the property. Retaining personal property in denial of the owner's right is no less a conversion than is wrongfully taking or destroying it, the detention constituting an unwarranted assumption of title. Hale on Torts, sec. 204 *et seq.; Nichols v. Newsom,* 6 N. C., 302; *Carraway v. Burbank,* 12 N. C., 306; *Hare v. Pearson,* 26 N. C., 75; *Glover v. Riddick,* 33 N. C., 582; *Rhea v. Deaver,* 85 N. C., 337.

Considered in the light most favorable to the plaintiff, the evidence tended to show that the defendant took possession of the plaintiff's property when it had no substantial claim of right to it, and instructed its agent, who had the actual possession and was informed of the plaintiff's title, "not to let anybody have anything"; that the property was afterwards sold, and that the defendant thereby suffered loss.

It was said that upon his own admission the plaintiff did not make a formal demand of the defendant before bringing suit; but the plaintiff contends that the conversion was effected when the property was wrongfully taken, and that a formal demand for its return was not an incident necessarily precedent to the institution of the action. In *University v. Bank,* 96 N. C., 280, the Court quoted with approval Chitty's statement that "in the case of a conversion by wrongful taking, it is not necessary to prove a demand and refusal." Furthermore, it is perfectly evident that a formal demand would not have availed the plaintiff because the defendant's agent had been specifically instructed to retain possession of the property. In this view of the case, we deem it unnecessary to pursue the inquiry whether the sale was made by the defendant or by the State Highway Commission, though we must not be understood as saying that there was no evidence tending to sustain the referee's finding, approved by the judge, that the sale of the plaintiff's property was made for the benefit of the defendant.

There was evidence in support of the defendant's position; but the determinative question is whether in any view of the testimony the plaintiff's theory can be maintained, and this question has been resolved against the appellant. The judgment is

Affirmed.

C. L. BOOTH, TRUSTEE OF ELIZABETH L. JAMES ET AL., v. SAMUEL HAIRSTON.

(Filed 31 January, 1928.)

1. Deeds and Conveyances—Requisites and Validity—Statutes—Special Laws—Validity.

A deed of gift not registered within the time prescribed by statute is void, and thereafter the Legislature is without power to bring it to life again by the enactment of a statute lengthening the period in which it may be registered.

STACY, C. J., and ADAMS, J., dissenting.

PETITION to rehear decision on appeal from GUILFORD County.

Brooks, Parker, Smith & Wharton, Andrew Joyner, Jr., and Malcolm Harris for appellant.

Meade & Meade and King, Sapp & King for respondent.

BROGDEN, J. This case was heard and determined by the Court in an opinion filed 23 February, 1927, and reported in 193 N. C., p. 278.

The defendant filed a petition to rehear. Because of the importance of the principle involved the entire case has been thoroughly reëxamined by the Court. The divergent views with respect to the principles of law involved are set forth in the main opinion and the dissenting opinion in the original case. The main conflict in the law, as announced in this State, arises upon a construction of *Spivey v. Rose,* 120 N. C., 163, and *Dew v. Pike,* 145 N. C., 303. The defendant contends that *Spivey v. Rose* is a direct authority supporting his position. The plaintiff contends that *Dew v. Pike* is a direct authority to the contrary. The statute, C. S., 3315, provides in substance that a deed of gift, if not proven in due form and registered within two years after the making thereof, shall be void. In *Spivey v. Rose* it is stated: "The General Assembly has regularly, every two years, enacted statutes extending the time for the registration of conveyances of real estate, since the execution of this deed up to the time of its registration, the first one on 31 March, 1871." The deed in question was executed 1 June, 1867.

Two years from that time would be 1 June, 1869. If the first act extending the time for the registration of deeds was passed on 31 March, 1871, then the General Assembly had not, every two years from the execution of said deed, extended the time for the registration of said deed. Whether the Court was under the impression that this had been done or whether that had anything to do with the holding, does not appear. Frankly, the holding in *Spivey v. Rose* and in *Dew v. Pike* cannot be harmonized except perhaps by attempting to draw microscopic distinctions. The bald question of law involved is whether or not the General Assembly can ratify a void deed. When the deed of gift in this case was given, the law required that it be registered within two years, and it went further and pronounced the instrument dead after the lapse of two years. The power of the Legislature to cure defective certificates or acknowledgments or probates or registration is undoubted and has been recognized, approved and set in the law in hundreds of cases; but the power to cure a crippled instrument, having at least a spark of legal life, does not extend to raising a legal corpse from the dead. The principle is stated in *Herring v. Lee,* 22 W. Va., p. 673, as follows: "The act of Sommerville in attempting to admit said deed to record being, as we have seen, absolutely void, and not simply voidable, the said curative act of 31 March, 1873, if it could be construed to apply to this case, would be unconstitutional and void. If it was competent for the Legislature to make a void proceeding or act valid, then said act might be invoked to sustain the deed in this case. But upon that question there cannot be a moment's hesitation. The Legislature can no more impart binding efficacy to a void act than it can take one man's property and give it to another. Indeed to do one is to accomplish the other."

The deed of gift was good between the parties within the period of two years, and therefore during said period vested the title in the grantee. At the end of two years, what became of the title to the property? Thereafter it could not vest in the grantee, because, if unregistered, the statute pronounced the instrument dead. The title could not rest in the clouds. It must vest somewhere. Obviously it vested in the grantor, and was so vested when the purported curative act was passed. The result therefore of the curative act was to wrest title out of plaintiff by the sheer act of the law. Under all the authorities vested rights cannot be impaired or controlled by curative acts.

Petition dismissed.

STACY, C. J., and ADAMS, J., dissenting.

L. P. LONDON v. BOARD OF COMMISSIONERS OF YANCEY COUNTY.

(Filed 31 January, 1928.)

Appeal and Error — Disposition After Remand — Proceedings in Lower Court.

When a case is remanded to the end that evidence to a certain finding of fact by the judge be made to appear in the record, and the opinion of the court is complete, the trial judge is confined to the particular point, and his inclusion of extrinsic matter will be disregarded.

CIVIL ACTION, before *Parker, J.*, at June Term, 1927, of YANCEY.

The following judgment was rendered: "This cause coming on for hearing, and in accordance with the decision of the Supreme Court, wherein the opinion says that this case is remanded to the Superior Court of Yancey County for specific findings as to whether the board of commissioners of said county in their corporate capacity made a supplemental contract or authorized the chairman or any other person to make it, and being heard, the court finds the following facts:

That the transactions and dealings by and between the plaintiff and the defendants relative to the road in controversy on 7 May, 1923, were between the plaintiff and said board on that date while said board of commissioners of three members—two of them were present, to wit, J. W. Wheeler, chairman, and Hooker Proffitt—were acting in their corporate and official capacity and at a meeting and during the meeting of said board of county commissioners of Yancey County.

The court further finds as a fact that the board of county commissioners of said county did not and have not at any time in their corporate capacity made the supplemental contract, and did not and have not at any time authorized the chairman or any other person to make it.

And upon the findings of fact theretofore entered by his Honor, Judge A. M. Stack, and these findings of fact, it is considered and adjudged that the plaintiff recover of the defendants the sum of $698, with interest thereon from 13 June, 1923, and the costs of this action up to and including the time of filing the answer, at which time the defendants in their answer tendered said amount and the costs, since said tender are taxed against the plaintiff. Said costs to include an allowance of $100 to Hon. W. C. Ervin, referee."

From the judgment rendered the plaintiff appealed.

Pless, Winborne, Pless & Proctor for plaintiff.
Charles Hutchins for defendant.

BROGDEN, J. This cause was considered by the Court upon a former appeal, which is reported in 193 N. C., p. 100. Exceptions were duly filed to the report of the referee and the cause was thereafter heard by Judge Stack in term.

Judge Stack made the following findings: "And it is found that the commissioners by their action and the action of the engineer, and by their acquiescence in the written statement of plaintiff, and by requiring plaintiff to build the road upon a new route, contracted to compensate him for his additional expense and loss by reason of such requirement."

The opinion of the Court in the former appeal, remanding the case, stated: "The only question, therefore, to be determined is whether there is evidence to support this finding of fact, that the board of commissioners made a supplemental contract with the plaintiff." And, further, "the cause is remanded to the Superior Court of Yancey County for specific findings of fact as to whether the board of commissioners of said county, in their corporate capacity, made the supplemental contract or authorized the chairman or any other person to make it."

The plaintiff testified in the former hearing that a supplemental contract was made by the commissioners in the engineer's office. It did not appear that the commissioners were acting in their official capacity in making such contract or merely discussing the matter informally as individuals. If the commissioners at that time were acting in their official capacity, then the testimony of plaintiff tended to establish a valid agreement. From the present hearing, pursuant to the order remanding the case, Judge Parker, as will appear from the judgment rendered, found as a fact that the board of commissioners were acting in their official capacity at the meeting at which plaintiff testified the supplemental contract was made. Therefore, there was evidence to support Judge Stack's finding in the former appeal. The opinion in the former appeal further declared: "If the board of commissioners of Yancey County were duly assembled and made the alleged agreement with the plaintiff, or if the board of commissioners authorized its chairman or any other person to give a letter of instructions directing the work to be changed, and agreeing to pay a fair compensation therefor, then the plaintiff is entitled to recover the amount allowed."

At the present hearing, it having been found that the commissioners were duly assembled in their corporate capacity, and the plaintiff having testified at the former hearing that a supplemental contract was made at such meeting, it necessarily follows that there was evidence to support Judge Stack's findings, and the judgment rendered by him must stand.

In finding that no supplemental contract had been made, Judge Parker extended the inquiry beyond the limitation prescribed in the former opinion.

Upon a consideration of the entire case the judgment of Judge Stack at the former hearing is affirmed, and the judgment of Judge Parker, rendered upon the present hearing, is affirmed, except to that portion of said judgment finding as a fact that the board of commissioners of Yancey County did not make a supplemental contract and did not authorize the chairman or any other person to make it. This portion of Judge Parker's judgment is reversed for the reason stated herein.

Modified and affirmed.

MARSHVILLE COTTON MILLS, INC., v. THOMAS MASLIN ET AL.

(Filed 31 January, 1928.)

Pleadings—Demurrer—Nature of Grounds.

An action is not subject to demurrer for misjoinder of parties and causes of action when founded upon a note secured by a mortgage and brought against the original payees, endorsers, some with and some without recourse, and in some instances of transfer fraud is alleged, its entire history arising from the same transaction and those connected with liability in various capacities for its payment.

CIVIL ACTION, before *Midyette, J.*, at Chambers, 12 August, 1927.

Small, MacLean & Rodman for plaintiff.
Parrish & Deal for R. C. Vaughan, receiver.

BROGDEN, J. The various pleadings in the cause allege the following facts: "Prior to October, 1925, W. M. Nissen owned a certain tract of land in Beaufort County, containing approximately 1,700 acres. Moore County Farms, Inc., owned a lot on Chestnut Street in Winston-Salem, upon which there was a first and second mortgage aggregating $51,000. Nissen agreed to sell the land in Beaufort County to Moore County Farms in exchange for said lot in Winston-Salem, and as a further consideration for said lot, to deliver certain shares of stock in the George E. Nissen Company. The Moore County Farms agreed to pay the indebtedness of $51,000 on its lot in order that Nissen could get a clear title thereto. Failing to secure a Land Bank loan, Moore County Farms requested Nissen to convey the land in Beaufort County to Thomas Maslin. This was done. Being unable to secure the loan, Thomas Maslin alleged that Nissen agreed to accept a mortgage on the Beaufort

County land in liquidation of the said indebtedness of $51,000 on the Winston-Salem lot. Thereupon Nissen, according to the allegations of Maslin, prepared a note for $65,000 and a deed of trust to Oscar O. Efird, trustee, upon the land to secure payment thereof. Maslin and wife executed this note and deed of trust. The note is as follows:

"$65,000. Winston-Salem, Forsyth County, N. C., 16 October, 1925. Four months after date, with interest from date until paid, payable semiannually, we promise to pay to W. H. Maslin or order, sixty-five thousand and 00/100 dollars. For value received in money loaned. Principal and interest payable at the office of the Wachovia Bank and Trust Company, Winston-Salem, N. C. Witness our hands and seals.
"Thos. Maslin, Martha M. Maslin."

On 16 October W. H. Maslin, the payee in said note, duly endorsed the same to the order of W. M. Nissen. On 17 April, 1926, Maslin and wife conveyed the land to Moore County Farms, subject to the said deed of trust securing the payment of said note for $65,000. On 1 December, 1926, W. M. Nissen, for value, duly endorsed without recourse the said note to the plaintiff. At the time of said endorsement Nissen represented to the plaintiff that the note was a valid and subsisting obligation of Maslin, and that there were no equities which could be set up against it.

The plaintiff brings a suit upon said note and for the foreclosure of said deed of trust. The suit is brought against Thomas Maslin and Martha Maslin, makers of said note. W. H. Maslin and W. M. Nissen, endorsers of said note, Oscar O. Efird, as trustee, Wachovia Bank and Trust Company as receiver of Merchants Bank and Trust Company, John H. Dyer, trustee, N. S. Poindexter, R. L. White and R. C. Vaughan. Vaughan is receiver for the Moore County Farms, Inc. The plaintiff filed a complaint and an answer was filed by Thomas Maslin. The receiver of Moore County Farms filed an answer, and thereafter the plaintiff filed an amended complaint, setting up substantially the same cause of action contained in the original complaint. Thereupon, the receiver of Moore County Farms filed a demurrer upon the ground that the complaint contained inconsistent causes of action and that there was a misjoinder of parties. The alleged misjoinder of causes of action is as follows: "That the complaint sets up separate causes of action against this defendant and W. M. Nissen, between whom there is no community of interest, for that it is alleged as a cause of action against this defendant, that a certain note and mortgage bearing date of 16 October, 1925, is a valid encumbrance upon the land mentioned in the complaint, and is also asking relief against W. M. Nissen upon the ground that the

mortgage and lien above mentioned is not a valid lien, and was transferred through fraud to the plaintiff on 1 December, 1926."

The trial judge overruled the demurrer. In this ruling we concur. The statute provides that several causes of action may be united in the same pleading if they arise out of "the same transaction or transaction connected with the same subject of action." What is the transaction in this case? Manifestly, it is the giving of a promissory negotiable note by Thomas Maslin to W. H. Maslin and the endorsement of that note by W. H. Maslin to Nissen, and the endorsement thereof without recourse by Nissen to the plaintiff. Nissen was connected with the note, which is the subject of the action because he endorsed it. Moore County Farms was a necessary party to the action because the mortgagor Maslin conveyed the property to the Moore County Farms after the execution of the mortgage or deed of trust. *Stancill v. Spain,* 133 N. C., 76.

The rule for determining misjoinder of causes of action is thus stated by *Walker, J.,* in *Hawk v. Lumber Co.,* 145 N. C., p. 48. "The result of the decisions is that, if the causes of action be not entirely distinct and unconnected, if they arise on one and the same transaction, or a series of transactions forming one course of dealing, and all tending to one end, if one connected story can be told of the whole, the objection of multifariousness does not arise."

The entire transaction in this case involves the validity of a note and the respective liabilities of the makers and endorsers. *Ayers v. Bailey,* 162 N. C., 209. The judgment overruling the demurrer is

Affirmed.

T. C. NORRIS v. M. O. GALLOWAY ET AL.

(Filed 31 January, 1928.)

1. Deeds and Conveyances—Timber Deeds—Construction.

Where N. and G. are grantees in a deed for standing timber upon certain lands, to be cut and removed within ten years, and thereafter N. becomes the owner of the lands, subject to the timber deed to himself and G., and N. conveys to G. the timber rights he has acquired under the former deed, referring thereto, and in his deed to the timber receives certain rights to cultivate the lands when cut over by G. and designated by him, with a further right of G. to cut and remove a certain kind of timber within two years from the first cutting: *Held,* G. could under the deed from N. cut the designated timber in a period of two years from the first cutting only when coming within the maximum time limit of ten years, and to this extent it was an enlargement of the right conveyed by the deed for the timber to N. and G.

NORRIS *v.* GALLOWAY.

CIVIL ACTION, before *Bowie, J.*, at July Term, 1927, of HAYWOOD.

The plaintiff instituted an action against the defendants to restrain the defendants from trespassing upon the lands in controversy and from cutting and removing timber therefrom. A temporary restraining order was issued and made returnable on 29 July, 1927. By consent the cause was heard by T. C. Bowie, judge holding the regular term of the Superior Court of Haywood County, who rendered the following judgment: "This cause coming on to be heard upon the application of the plaintiff to continue the restraining order theretofore in this cause issued, to the final hearing, and both the plaintiff and the defendants consenting that the matters in issue be heard before his Honor, T. C. Bowie, judge presiding, and the same being heard, this 22 July, 1927: It is therefore ordered, considered and adjudged by the court that the restraining order heretofore issued be dissolved and that the plaintiff pay the cost of the action."

From the foregoing judgment plaintiff appealed.

Morgan & Ward, M. G. Stamey and Jos. E. Johnson for plaintiff.
W. B. Francis and Alley & Alley for defendants.

BROGDEN, J. On 2 March, 1920, E. W. Sharp and wife conveyed to T. C. Norris and M. O. Galloway, in consideration of $3,500, "all of the timber standing, lying and being and growing, and which might grow during the period hereinafter named, of any and all kinds whatsoever" upon a certain boundary of land consisting of about 300 acres. The timber deed provided that the grantee should have ten years from date in which to cut and remove the timber. Said deed also contained the following restrictions: "It is understood and agreed that when the parties of the second part shall have cut from any portion of said land all the timber and the wood which they desire or may desire to remove from said portion of said boundary, then the parties of the second part shall designate such portion and permit the parties of the first part to clear that portion of said land so designated and sow the same in grass or otherwise use that portion of said land as the parties of the first part may desire."

On the same day Sharp and wife conveyed to the plaintiff, T. C. Norris, the land upon which the timber was growing by a proper deed of conveyance. This deed contained the following clause: "Excepting and reserving all the timber on said boundary of land with the right to remove the same within ten years from date hereof, in accordance with a deed of even date herewith, for said timber by the parties of the first part to T. C. Norris." The parties, therefore, were in this situation:

Plaintiffs T. C. Norris and M. O. Galloway held a timber deed for the timber of the kind specified on the land. The plaintiff, Norris, then became the owner of the land subject to the timber deed to himself and Galloway.

Thereafter, on 27 November, 1920, Norris and wife conveyed to Galloway "their one-half interest in all the timber standing, lying and being and growing, and which might grow during the period, as set forth in a certain timber deed from E. W. Sharp and wife to T. C. Norris and M. O. Galloway." This deed from Norris to Galloway recited that the grantee Galloway should have "the right of ingress, egress and regress, to, over and through said tract of land for the purpose of cutting and removing said timber, and also the right of sawyards for the setting up and operating of sawmills on said boundary for the period as set forth in said deed as recorded in Book 54, p. 555" (deed from Sharp and wife to Norris and Galloway). The deed for the "one-half interest" from Norris and Galloway contained the following clause: "It is understood and agreed that when the party of the second part shall have cut from any portion of said land that all the timber and wood which he desires to cut and remove from said land, that the party of the first part shall have the right to clear, cultivate or sow in grass the land from which the timber is removed. And the party of the second part shall have two years after he has cut and removed timber from any portion of said land to go back and remove any hemlock wood that he may have left when he first cut over said land, provided the two years come within the period as set forth in the deed recorded in Book 54, p. 555, heretofore referred to. The parties of the first part sell and convey to the party of the second part all their rights and interest that they obtained in the said deed as recorded in Book 54, page 555, except as above set forth in this deed."

The plaintiff contends that after he purchased the land and executed deed to Galloway for his "one-half interest" in the timber that the clause above quoted in his deed to Galloway curtailed and restricted the right of Galloway or his assigns to cut any timber upon said land after the expiration of two years from the first cutting. That Galloway or his assigns had cut over the timber more than two years ago, and hence all rights of Galloway in and to said timber had ceased. The defendant Galloway, upon the other hand, contends that the deed from Norris to him is an enlargement of his right to cut rather than a restriction. So that the merit of the case resolves itself into an examination of these contentions.

The deed from Sharp to Norris and Galloway provided that the grantees should have ten years within which to cut and remove "all the

timber standing, lying and being and growing, and which might grow during the period," etc. It was further provided therein that when the grantees had cut and removed all the timber which they desired upon any designated portion of the land, the grantors could reënter *such portion so designated* and hold the same in such manner and to such extent as the grantors should desire. In other words, the right to cut and remove any more timber from such portion so designated by the grantees ceased if the grantors should so desire. The deed from Norris and wife to Galloway expressly recognizes the right of the grantee to cut and remove the timber for a period of ten years, but provides that when the grantee cuts and removes all the timber which he desires from any portion of the land, thereupon the grantors shall have the right to clear, cultivate and sow in grass such portion, subject, however, to the right of the grantee to reënter such portion and remove any hemlock wood only, if such removing of such hemlock wood shall be done within two years from the first cutting and within the ten-year period.

The essential difference between the restrictions in the two deeds is this: In the Sharp deed the grantees designated the portion of land upon which all desired cutting had been done, and thereupon they could not reënter such portion for the purpose of cutting if the grantors objected. In the Norris deed, when any portion of land had been cut over, the grantors could reënter, but could not prevent the grantee from going back upon such portion and removing hemlock wood if done within two years from the first cutting and within the ten-year period. Under this construction the covenants in the deed from Norris to Galloway tend to enlarge rather than restrict the timber rights of defendant. So that the defendant has the right to cut and remove the specified timber for a period of ten years; provided, however, that as to such portion which has been cut over and cleared or cultivated or sowed in grass by the plaintiffs, then defendant can reënter and remove hemlock wood only, and this must be done within two years from the first cutting and within the maximum period of ten years.

We conclude upon the record that the plaintiff is not entitled to restrain the cutting of the timber, and the judgment resolving the temporary restraining order is affirmed. It is further ordered that the restraining order granted pending this appeal be, and the same is hereby dissolved.

Affirmed.

ALFRED JACKSON v. ROYALL & BORDEN MANUFACTURING COMPANY.

(Filed 31 January, 1928.)

1. Master and Servant—Master's Liability for Injuries to Servant—Warning and Instructing Servant—Negligence.

When an employee at work at a power-driven machine, simple in its operation, and under circumstances in which he was in a position to fully know his danger, does a negligent act easily avoidable by him that causes the injury in suit, he may not recover of his employer for the injury received by him in consequence of his own act, though the vice-principal of his employer had formerly instructed him of a very obvious remedy to be applied under the circumstances of the particular case, and which would not have caused the injury, except for the employee's negligent act.

CIVIL ACTION, before *Lyon, J.*, at May Term, 1927, of RICHMOND.

The evidence tended to show the following facts: The plaintiff, a young man about twenty years of age, was employed by the defendant to work in a felt factory. On the day of his injury he was working at a machine that mixed felt for mattresses. At one end of the machine there was an apron which was about three feet long and two feet across. A leather belt with slats tacked thereon carried the cotton along the apron to the rollers and through the rollers into the machine. The rollers are back of the apron next to the machine and are about six inches in diameter.

The plaintiff's narrative of his injury is as follows: "Mr. Renn showed me how to put cotton or felt in the machine and told me when the rollers got choked to unchoke it with a pitchfork, and when the apron got choked to hold it with one hand and clean it out with the other. He showed me how to stop it with my hand and clean it out. . . . The apron got choked and I got up and tried to clean it out, and I tried to stop it with one hand to clean it out. I had got wet and cold that morning on the truck and could not stop it, my hand being cold and stiff, and it kept moving along until the rollers caught my hand. I did not know my hand was in danger until the rollers caught it. . . . I was given no instructions except that Mr. Renn told me how to unchoke the rollers with the pitchfork and how to clean out the apron with my hand. . . . I knew that if my hand got caught between the rollers it would be crushed, but I did not know my hand would get into the rollers. . . . There was a belt with slats on it—the apron—that carried the cotton to the rollers. I tried to stop the slats. I was trying to stop the machine like Mr. Renn said to stop it. . . . The slats were not running when I started to clean it out. When I got it

cleaned out it began to move off, and I was still working with it until I got all the trash out. . . . I had my hand on the slats and was working underneath when the rollers caught my hand. I did not forget about my hand, but I could not stop the slats; I was trying to stop the slats. (Q). You just had to take your hand up? I don't know. I was looking underneath where I was working."

Plaintiff's left hand was caught in the rollers and crushed, necessitating amputation.

Issues of negligence, contributory negligence and damages were submitted to the jury and answered in favor of plaintiff, and the verdict awarded $2,500 in damages.

From judgment upon the verdict the defendant appealed.

J. C. Sedberry for plaintiff.
Bynum & Henry for defendant.

BROGDEN, J. The only serious question presented by the record is whether or not the motion for nonsuit should have been allowed.

No defect in the machine was alleged and no evidence thereof offered. The method of doing the work by placing the cotton on the moving belt or slats, to be conveyed to the rollers, was usual, approved and not dangerous. "It is well recognized that, although the machinery and place of work may be all that is required, liability may, and frequently does, attach by reason of the negligent orders of a foreman, or boss who stands towards the aggrieved party in the place of vice-principal." *Hoke, J.,* in *Howard v. Oil Co.,* 174 N. C., 651. It is also well established that, "where one having authority to give orders to another, who is inexperienced, gives a negligent order, which a reasonably prudent man would not give, and the servant is injured in attempting to obey said order, and the giving said order was the proximate cause of his injury, the servant is entitled to recover." *Clark, C. J.,* in *Holton v. Lumber Co.,* 152 N. C., 68.

The sole inquiry is to determine whether or not the foreman gave a negligent order or instruction in directing the plaintiff "when the apron got choked to hold it with one hand and clean it out with the other." It must be observed from the plaintiff's testimony that the rollers at the top of the apron were readily observable and that he fully appreciated the danger of permitting his hand to come in contact with them. It must also be observed that there was no danger in laying the hand upon the slats or moving belt unless the hand was permitted to remain on the moving belt and be conveyed to the rollers. When cotton had fallen from the moving belt to the apron and choked it the moving belt or

slats came to a standstill. The plaintiff put his hand upon the stationary slats or belt and began to unchoke the apron. When partially unchoked the slats began to move and plaintiff, according to his own testimony, while looking under the apron, with his hand upon a moving belt, and charged with knowledge that the belt was moving toward the rollers, and that the rollers would crush his hand, still permitted his hand to remain until it was fed into the rollers and crushed.

This case is governed by the principle announced by the Court in *Mathis v. Mfg. Co.,* 140 N. C., 530. In that case *Brown, J.,* said with reference to plaintiff's injury: "He was injured, according to his own evidence, by running his hand under the table without looking where he put it. The foreman could not have imparted to plaintiff any further information than he already had. The plaintiff had equal knowledge with the foreman as to the dangers incident to operating the saw, and he had sufficient discretion, so far as age and experience go, to appreciate the peril. The plaintiff knew the danger incident to cleaning out the sawdust box with the circular saw revolving rapidly just above it as well as the foreman could have told him."

So in the present case the order given by the foreman to the plaintiff was to perform a duty that in itself was simple and safe. Of course, if the workman permitted his hand to remain on the belt and be drawn into the rollers, serious injury was imminent and certain, but the plaintiff was thoroughly aware of this situation.

Upon a consideration of the entire case and the rules of law applicable, we are of the opinion that the motion for nonsuit should have been allowed.

Reversed.

STATE v. ANNA K. MONTAGUE.

(Filed 31 January, 1928.)

Criminal Law—Evidence—Sufficiency.

Circumstantial evidence of a homicide is not sufficient when by any reasonable inference therefrom the question of guilt should remain uncertain in the mind of the jury, and under these circumstances defendant's motion as of nonsuit should have been allowed.

CRIMINAL ACTION, before *Shaw, J.,* at June Term, 1927, of BUNCOMBE.

The defendant, Anna K. Montague, was indicted for the murder of Mary A. Cooper, and was convicted of murder in the second degree, and

sentenced to the State prison for a term of not less than twelve nor more than twenty years at hard labor. The record shows that the jury "recommends the defendant to the mercy of the court."

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Lusk & Beachboard and Reynolds & Sullivan for defendant.

BROGDEN, J. The testimony discloses certain independent and unconnected circumstances upon which the State relied for conviction. The principle of law declared in *S. v. Goodson,* 107 N. C., 798, is pertinent to the facts disclosed in this case. Goodson was convicted of murder and sentenced to death. The Court said: "We have examined with much care and scrutiny the evidence sent up as part of the case stated on appeal, and are of opinion that it was not sufficient to prove the prisoner's guilt, or to go to the jury for that purpose. Accepting the evidence as true, and sufficient to prove the facts to which it related, and giving these facts, severally and collectively, and in their bearing each upon the other, due weight, in any view of them they simply raise a strong suspicion of his guilt. The evidence pointing to the prisoner is circumstantial. The facts may be true; they may be taken, in any combination of them of which in their nature they are capable, and they fail to prove his guilt; they are inconclusive as to the material fact of guilt. . . . This full summary of the incriminating facts, taken in the strongest view of them adverse to the prisoner, excite suspicion in the just mind that he is guilty, but such view is far from excluding the rational conclusion that some other unknown person may be the guilty party. The mind is not simply left in a state of hesitancy and anxious doubt—it refuses to reach a conclusion."

So, in the present case, much could perhaps be written upon the various aspects of circumstantial evidence as a means of arriving at ultimate truth. Much, too, could be written with reference to weighing these circumstances and knitting them together in various and sundry combinations. But after all, the whole matter resolves itself into an interpretation of the record. As to this, different minds will reach different conclusions. Although we should assemble the precedents and authorities in martial array and dissect each one, the inevitable and ultimate question would still be ever present: "How do you apply these principles to the present record?"

After a diligent investigation, by the entire Court, of the records and briefs, three of us are of the opinion that the circumstances relied upon for conviction create suspicion more or less grave, but do not rise to that

dignity and import which the law recognizes as competent evidence upon the charge laid in the bill of indictment. After the same diligent investigation, two of us hold the contrary view.

In this situation, therefore, we hold that the judgment of nonsuit duly made at the close of the entire testimony should have been allowed.

Reversed.

ADAMS, J., dissenting: In *S. v. Carlson,* 171 N. C., 823, it was said by this Court: "The motion to nonsuit requires that we should ascertain merely whether there is any evidence to sustain the allegations of the indictment. The same rule applies as in civil cases, and the evidence must receive the most favorable construction in favor of the State for the purpose of determining its legal sufficiency to convict, leaving its weight to be passed upon by the jury. *S. v. Carmon,* 145 N. C., 481; *S. v. Walker,* 149 N. C., 527; *S. v. Costner,* 127 N. C., 566. The effect of Laws 1913, ch. 73, allowing a motion for nonsuit in a criminal case, was considered in *S. v. Moore,* 166 N. C., 371; *S. v. Gibson,* 169 N. C., 318. Where the question is whether there is evidence sufficient to warrant a verdict, this Court considers only the testimony favorable to the State, if there is any, discarding that of the prisoner. *S. v. Hart,* 116 N. C., 976. The weight of the evidence and the credibility of the witnesses are matters for the jury to pass upon. *S. v. Utley,* 126 N. C., 997."

Discarding the evidence of the defendant and considering that which is favorable to the State, I do not concur in the intimation that the testimony consists of nothing more than certain independent and unconnected circumstances upon which the State relied for conviction. The evidence, as I read it, reveals a series of incidents and circumstances which are so intimately connected, not to say interwoven, as to point directly to the defendant's guilt. The *corpus delicti* was admitted, it was not denied that the homicide occurred at the home of the deceased after eleven o'clock at night. The evidence tended to show that at this hour only three persons were in the house: the deceased and the defendant on one floor, and the registered nurse on another. There was evidence of the defendant's motive and opportunity for the commission of the crime, and her ill-will and purpose, of the significant circumstances under which she left Mrs. Cooper's on the morning preceding the homicide to go to West Asheville, of her admission that "when dark came" Mrs. Cooper kept coming into her mind, and that she knew "that something was going to happen to Mrs. Cooper," of the late hour of her return to Mrs. Cooper's home—the assault, her conduct, her inconsistent statements, her effort to conceal material evidence, and

her possession of garments, one of them bloody, owned by Mrs. Cooper and concealed in the defendant's trunk, with other articles which were damp, soon after the homicide. These are only a part of the series of circumstances which were submitted to the jury in a full and discriminating charge. Not only is circumstantial evidence an accepted instrumentality in the ascertainment of truth; it is essential to the administration of justice, and in my opinion its efficacy should be maintained unimpaired.

I am authorized to say that the CHIEF JUSTICE concurs in this opinion.

CLAUD SUGG, A. T. GRIMSLEY, E. D. BOWEN, W. W. BOWEN, WILLIS DIXON, ZELL LASSITER, CONNOR ROUSE, LUTHER MEADOWS AND L. C. EDWARDS, ON BEHALF OF THEMSELVES AND OTHER CITIZENS, QUALIFIED ELECTORS AND TAXPAYERS OF OLDS AND ORMONDS TOWNSHIP, *v.* J. E. DEBNAM, W. D. COBB, W. A. DILDY, J. E. ALBRITTON AND L. A. MEWBORN, CONSTITUTING THE BOARD OF EDUCATION OF GREENE COUNTY, AND H. G. ROBERTSON, COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION OF GREENE COUNTY.

(Filed 31 January, 1928.)

For Digest, see *Parker v. Debnam, post*, 56.

APPEAL by plaintiffs from *Nunn, J.*, at Chambers in the city of New Bern, 6 July, 1927. From GREENE. Affirmed.

Shaw & Jones and Albion Dunn for plaintiffs.
J. Paul Frizelle for defendants.

CLARKSON, J. This is a companion action to that of *Parker v. Debnam, post*, 56.

The plaintiff's questions:

"1. Has the board of education of Greene County adopted a county-wide plan of organization of its schools?

2. Does the county board of education have the power to consolidate the schools in the special tax district, created by the election of 17 May, 1927, without first complying with the rules and regulations prescribed by section 73-a of Article six of the Public School Law?"

Defendants contend: "The purpose of this action was, in part, to have declared null and void the election held in the special school taxing district on 17 May, 1927. The appellants now concede the validity

of the election, the establishment of the special school taxing district, and the validity of the special tax rate voted in the election. So that the only question now before the Court is the correctness of his Honor's judgment as to the finding of fact that the county of Greene has a county-wide plan of organization of schools adopted in conformity to the school law, and as to the conclusion of law that the act of the board of education in consolidating the several school districts embraced in and composing the special school taxing district was valid and legal."

Section 73-a of Article 6 of the Public School Law is referred to in plaintiffs' question, *supra.* See Public Laws 1923, ch. 136, 73-a, 3 C. S., 5481. Also Public Laws of N. C., Extra Session, 1924, ch. 121. This relates to the method of adopting the *county-wide plan* for any county.

The court below found the facts: "That the county of Greene has a county-wide plan of organization of schools adopted 20 August, 1925, under and pursuant and in full compliance with the provisions of section 73-a, Art. 6, of the Public School Law of North Carolina, codification of 1923; Public Laws 1923, ch. 136, Art. 6, 3 C. S., 5481, and that the board of education has worked under said plan and the modification thereof subsequently adopted in compliance with the provisions of the school law in the operation of the schools and the management of the school affairs of Greene County."

The record discloses by the affidavit of the five members of the board of commissioners for the county of Greene, that an election was called on 4 April, 1927, by said board in the special school tax district to be held on 17 May, 1927. That the call was made upon the petition presented to the board duly approved by the county board of education. "That an election had been held in said district on Tuesday, 22 February, in which there was only one polling place, to wit, Maury, and that the plaintiffs in this action, and other opponents of the election, having complained that the election was not fairly held and did not give the opponents of the measure a fair chance to express themselves at the polls for the reason that there was only one polling place, *and said election having by consent of all parties been adjudged void and of no effect,* when deponents came to order a new election to be held as herein set out on 17 May, *the plaintiffs in this action, in person and by counsel came before the board of commissioners and stated to the board that, if the board in calling said election would designate two polling places in said special school tax district instead of one, one of said polling places to be regular polling place of general elections in Ormonds Township and the other to be the regular polling place for general elections in Olds Township, and would give the plaintiffs and those in sympathy with their views, and who were opposed to said election, representation*

in the appointment of the registrars and judges of the election, the plaintiffs, in the event said election should be carried, would abide by its result and offer no further opposition to the creation of said special school tax district or the voting of the special tax therein, and that the plaintiffs would in good faith stand by and support the same and the policy and plans of the board of education with respect to said school district and the levying and collection of the special tax therein voted to supplement the general school fund; and that the deponents did call said election, and upon the request of the plaintiffs in this action, did designate the polling places requested by plaintiffs and did give the plaintiffs representation in the appointment of the registrars and judges of the election. Deponents further state that, upon the bringing in of the certificate of the local tax election returns by the registrars and judges of election showing that a majority of 126 registered vote was cast for the special tax, it was duly spread upon the minutes of the board of county commissioners, and by proper resolution said election was adjudged and declared carried."

The returns show: "Olds Township: Number of voters registered, 373; number of voters for, 201; number of voters against, 51. Ormonds Township: Number of voters registered, 401; number of voters for, 249; number of voters against, 152."

The court below found as a fact: "That in said election there were 774 registered and qualified voters from all the school districts embraced in the special taxing district, and that in said election the school districts, both the special tax and the nontaxing districts, voted as a unit and not separately; that from the entire registered voters 450 voted in favor of said tax and said taxing district, and 324 voted against said tax and said special taxing district, or were counted as voting against same."

It will be noted that those who voted for numbered 450; those who voted against numbered 324; for a majority of 126.

It seems in this matter there was a free ballot and a fair count. The plaintiffs lost.

We have cited the decisions bearing on the questions in *Parker v. Debnam, supra.*

From the record we can see no reason for disturbing the findings of fact or conclusions of law by the court below. The judgment is

Affirmed.

BOARD OF COMMISSIONERS FOR THE COUNTY OF WAKE, EDGAR D. PEEBLES, O. L. RAY, W. L. WIGGS, S. T. BENNETT AND L. Y. BALLENTINE, MEMBERS OF SAID BOARD OF COMMISSIONERS FOR THE COUNTY OF WAKE, v. THE STATE HIGHWAY COMMISSION OF NORTH CAROLINA, AND FRANK PAGE, STATE HIGHWAY COMMISSIONER.

(Filed 31 January, 1928.)

1. Highways—State Highway Commission—Powers.

The creating of the State Highway Commission and the giving it authority for the creation, maintenance, etc., of a State-wide system of public roads, and the amendatory act providing for the taking over, within certain limits, county highways, or parts thereof as links in the State-wide system, and for the coöperation of the State Highway Commission in such case with the road-governing body of a county for the mutual benefit of both the county and the State, are statutes to be construed together *in pari materia.*

2. Same.

The provision in the statute amending the State Highway Commission Act that the State Highway Commission in taking over a county road as a link of the State system of public highways coöperate with the road-governing body of the county for the best interests of both the State and the county does not impair the large discretionary powers given by statute to the State Highway Commission, acting in good faith, and when it is found as a fact in the lower court that they have so coöperated, the decision of the State Highway Commission in selecting a different route than the one fixed upon by the county authorities, cannot be disturbed by the courts.

3. Appeal and Error—Review—Presumptions—Injunctions.

While on appeal from proceedings in injunction the Supreme Court may review the evidence upon which the lower court has based its findings of fact, the burden is on the appellant to show error, with the presumption in favor of the judgment appealed from.

APPEAL by plaintiff from *Sinclair, J.,* at Chambers, 10 August, 1927, from WAKE. Affirmed.

L. L. Massey, J. W. Bailey, Leon S. Brassfield and J. M. Broughton for plaintiff.

Attorney-General Brummitt and Assistant Attorney-General Ross for defendants.

CLARKSON, J. This was an injunctive proceeding brought by plaintiff against the defendants, seeking a restraining order, or injunction, against defendants from taking over certain county roads in Wake County and making them a part of the State highway system for State maintenance. A temporary restraining order was issued against the

defendants. At the hearing it was dissolved and the permanent injunction refused, and the action dismissed. Plaintiff excepted, assigned error and appealed to the Supreme Court.

The decision of this action depends upon the construction of certain statutes of the General Assembly of North Carolina, in reference to the State highway system. Chapter 2, Public Laws of 1921, was the key act for the present State-wide system of hardsurfaced and dependable roads. It was construed in *Carlyle v. Highway Commission,* 193 N. C., at p. 48, as follows: "We are therefore of the opinion that the statute means that when an existing highway has been designated, mapped, selected, established and accepted by the State Highway Commission as the sole and independent connection between two county-seats in compliance with the formalities prescribed by the statute that this is a location of the road as a permanent link of the State system of highways." *Newton v. Highway Commission,* 192 N. C., 54; *S. c.,* 194 N. C., 159; *S. c., ibid.,* 303; *Smith v. Highway Commission, ibid.,* 333.

In addition to the roads mapped and made a part of the State highway system, the act, Laws 1921, ch. 2, sec. 10, subsec. (b), in part is as follows: "To take over and assume exclusive control for the benefit of the State of any existing county or township roads, and to locate and acquire rights of way for any new roads that may be necessary for a State highway system, with full power to widen, relocate, change, or alter the grade or location thereof, to change or relocate any existing roads that the State Highway Commission may now own or may acquire; to acquire by gift, purchase, or otherwise any road or highway that may be necessary for a State highway system."

In the *Newton case, supra* (194), at p. 171-2, this Court said: "However, the defendant has the power, under the law, if, in its discretion the exercise thereof shall seem wise and proper under section 10, subsection (b), 'to locate and acquire right of way for *any new roads* that may be necessary for a State highway system, with full power to widen, relocate, change or alter the grade or location thereof.' The Legislature, in its wisdom, by this section of the law, empowered the defendant to select and construct new roads which it deemed necessary for the State system in such way and manner and in such places as it might determine."

Chapter 200, Public Laws 1927, the caption reads as follows: "An act to require the State Highway Commission to take over additional mileage for State maintenance in the several counties of the State of North Carolina." The act is as follows:

"Section 1. That the State Highway Commission is hereby authorized and empowered, and it shall be their duty to take over for State maintenance, additional roads heretofore maintained by the several counties,

amount of additional roads so taken over for State maintenance shall not exceed twenty per cent of the present mileage as is now designated and maintained as State highways.

"Sec. 2. The laying out, and designation of new roads placed on the State highway system as State maintained roads, shall be left entirely in the discretion of the said Highway Commission in the respective districts, dividing the mileage of new roads taken on in counties which have heretofore not received as much State highway mileage as to make said county or counties share equally as nearly as practicable with other counties of the State, or in the discretion of the State Highway Commission in said district to place said additional roads on State maintenance that will best serve that section of the State.

"Sec. 3. That the State Highway Commission shall work in coöperation with the road-governing body of the counties in their respective and several districts in the laying out of these roads, always looking after the interest of both county and State in so doing.

"Sec. 4. That all laws in conflict herewith are to the extent of such conflict hereby repealed."

The plaintiff contends: "An act known as the Smith-Hargett Act, which in its official form would have granted to the Highway Commission absolute and unlimited power with reference to changing, altering or abandoning highways as designated on the original highway map, but which in the form eventually passed (chapter 46, N. C. Public Laws of 1927), carefully safeguarded such additional authority as was granted, and in particular stipulated that the county road-governing authorities should be heard on all matters involved; (b) the additional mileage bill which was adopted (chapter 200, Public Laws of 1927), but which provided not merely for notice to or hearing on behalf of the county road-governing authorities, but went further and stipulated that the additional mileage to be taken over should be done only after coöperation with the county road-governing authorities. In granting the authority and making direction for additional mileage to be added to the State highway system, as provided in chapter 200 of the 1927 Public Laws, the Legislature imposed three positive and definite conditions: (1) The authority given is to take over for State maintenance only additional roads theretofore maintained by the several counties. Manifestly this cannot be construed as authority to build new roads, but only to take over existing roads; (2) a separate and distinct section (sec. 3) provides 'That the State Highway Commission shall work *in coöperation* with the road-governing body of the counties in the laying out of these roads.' (3) The third condition is that in taking over such additional highways, the Highway Commission should always look after the interest of both county and State."

We must construe the section of the act of 1921, mentioned *supra,* with the act of 1927. In fact, the act of 1927, in clear language says: "That all laws in conflict herewith are *to the extent of such conflict,* hereby repealed." This Court, in construing the act of 1921, in the *Newton case, supra,* in unequivocal language said that the State Highway Commission was empowered to add new roads to the State system. The act of 1927, ch. 200, was passed giving the State Highway Commission authority and power and making it the duty to take over for State maintenance additional roads heretofore maintained by the several counties, the additional roads not to exceed 20 per cent of the present mileage of State maintained roads. This was to relieve the counties of maintenance and put the roads under the State highway system. This act was no doubt passed because the State highway system is financed solely by automobile license and gasoline tax, and after paying interest on the State bonds for building the roads, the upkeep or maintenance of the roads, the sinking fund provided for to meet the bonds as they mature, there was a large surplus in the treasury. This was collected for road purposes and should be so used. It would be a narrow construction of the two acts, construed *in pari materia,* and under existing conditions, to say in adding the new county roads to the State highway system, that new links could not be added to make a composite system. In fact, the act of 1927 says "to place said additional roads on State maintenance *that will best serve that section of the State.*" The intent of the General Assembly was directed not only to the roads being taken over from the county, primarily for maintenance and relieve the county, but in so doing service to the section of the State is one of the factors to be considered.

The serious question is the language of the 1927 act, which says: *"That the State Highway Commission shall work in coöperation with the road-governing body of the counties"* in laying out these roads.

The court below found the facts and based its conclusions of law on the facts so found, which is fully shown by the record. On the question of *coöperation* we quote the finding as follows: "The court is further of the opinion, and so finds, that in the laying out and designation of the said roads the defendant has complied fully with all the requirements of chapter 200, of the Public Laws of 1927, *and has coöperated fully with the board of commissioners of Wake County as fully and completely as the requirements of that act demand,* in that the defendant has endeavored to secure said road in accordance with an agreement of plaintiffs, except in minor details heretofore referred to, but has at the same time used its discretion in good faith in placing said roads under State maintenance in such manner as will best serve that section of the State and county, in shortening the alignments of the roads and

utilizing to the best advantage the topography of the ground, the conclusions reached in its discretion being based upon the expert knowledge of the defendant and the advice of its expert engineers as to the efficient and economical construction and maintenance of the said road." (Italics ours.)

In *Wentz v. Land Co.*, 193 N. C., at p. 34, it was said: "In injunction proceedings this Court has the power to find and review the findings of fact on appeal, but the burden is on the appellant to assign and show error, and there is a presumption that the judgment and proceedings in the court below are correct. *Sanders v. Ins. Co.*, 183 N. C., 66.

There was some evidence to support the findings of the court below. The burden is on the plaintiff, appellant, to show error, which it has not done. The judgment of the court below is

Affirmed.

R. L. TAYLOR v. J. A. JONES CONSTRUCTION COMPANY, AND J. W. MARKHAM.

(Filed 31 January, 1928.)

1. Torts—Joint Tort-Feasors—Liability.

The ordinary rule of law that there is no primary and secondary liabilities between joint *tort-feasors* is not varied by the exceptions arising in equity when in the joint tort each joint *tort-feasor* is charged with equal responsibility to the injured party and the combined, active and concurrent negligence of each equally causes the injury in suit.

2. Trials—Issues—When They Arise—Master and Servant—Negligence.

When a contractor and subcontractor are engaged in the erection of a building, and the evidence tends to show that an employee of the former was injured by a falling beam while engaged in the performance of his duties, the falling of which was caused by the negligence of the servants of the latter, under conditions that were unsafe and known to each master, who negligently permitted the dangerous conditions to continue, the issue as to whether the principal contractor was secondarily liable does not arise.

3. Trials—Instructions — Construction — Appeal and Error — Review — Harmless Error.

Where an instruction of the court is clearly correct upon the principles of law arising from the evidence, it will not be held for reversible error that in one minute particular there was a semblance of error, when it is apparent that the jury could not have been misled thereby.

CIVIL ACTION, before *MacRae, J.*, at September Special Term, 1927, of MECKLENBURG.

This cause was considered in a former appeal which is reported in 193 N. C., 775. The facts are substantially as follows: "On 21 September, 1925, the plaintiff, a carpenter, was employed by defendant, J. A. Jones Construction Company, and had been in its employ seven or eight years. Prior to 21 September, Mrs. Sallie D. Wilder, the owner of a lot in Charlotte, entered into a contract with defendant, J. A. Jones Construction Company, to construct a ten-story office building, with the exception of the steel frame. The contract for furnishing the steel and the erection thereof was awarded by the owner to the defendant, A. J. Dietrich, and thereafter Dietrich made a contract with the defendant, J. W. Markham, a contractor for steel erection, by the terms of which the said J. W. Markham should perform the work of constructing and erecting into the steel frame of the building the steel furnished by the defendant Dietrich. The steel work consisted of raising and placing long, heavy steel beams in the various stories of said building."

Plaintiff alleged that the defendant Markham, in erecting the steel, "negligently failed to provide or construct, or cause to be provided or constructed . . . any proper temporary floor, or deck, which could or would have caught falling beams, and that defendant Markham, and "his employees, in raising said beam, negligently failed to use a proper tag or guide line, attached to said beam for the purpose of steadying and preventing said beam from slipping out of said sling or loop."

The plaintiff further alleged "that the defendant, J. A. Jones Construction Company, negligently failed to construct or provide or cause to be constructed or provided beneath the point or points to which the said steel beam was being hoisted and where it was being set, and above the floor where plaintiff was working, any proper temporary floor or deck suitable to catch falling beams, or any covering beneath said point or points and above said floor such as was approved and in general use."

The plaintiff offered testimony tending to show that, while he was building or assisting in building a form or casing, and the steel beams referred to were being raised, hoisted and set above his head, a large beam fell from above, striking him and inflicting serious and permanent injuries. There was further testimony tending to show that the superintendent of the construction work of defendant, J. A. Jones Construction Company, was fully aware of the danger to plaintiff and other workers by reason of the absence of a protective flooring or decking, and that he had made complaint to the architect and the architect had instructed the defendant Markham to install such flooring or decking for the protection of the workmen.

The issues and answers of the jury thereto were as follows: "1. Was the plaintiff injured by reason of the negligence of the defendant, J. W. Markham, as alleged in the complaint? A. Yes. 2. Was the plaintiff

injured by reason of the negligence of the defendant, J. A. Jones Construction Company, as alleged in the complaint? A. Yes. 3. Did the plaintiff contribute to his own injury, as alleged in the answer of J. W. Markham? A. No. 4. What amounts (if any) is plaintiff entitled to recover of the defendants or either of them? A. $25,000."

From judgment upon the verdict the defendants appealed.

Brenizer & Scholl for plaintiff.
J. Laurence Jones for Jones Construction Company.
James A. Lockhart for defendant, J. W. Markham.

BROGDEN, J. The defendant, Jones Construction Company, in apt time tendered the following issue: "Was the negligence of the defendant, J. W. Markham, primary, and that of J. A. Jones Construction Company, secondary?"

The trial judge refused to submit this issue, and such refusal constitutes the main exception in the case. The question of law presented, therefore, is when does the principle of primary and secondary liability apply in actions for personal injury?

The general rule is that there can be no indemnity or contribution between joint *tort-feasors.* It is also familiar learning that there are certain well recognized exceptions to the general rule, and that in proper cases indemnity or contribution is allowed, but such recoveries rest solely and entirely upon established principles of equity. The question involved has been considered by this Court in the following cases: *Dillon v. Raleigh,* 124 N. C., 187; *Gregg v. Wilmington,* 155 N. C., 18; *Commissioners v. Indemnity Co.,* 155 N. C., 219; *Sircey v. Rees' Sons,* 155 N. C., 296; *Doles v. R. R.,* 160 N. C., 322; *Ridge v. High Point,* 176 N. C., 421; *Bowman v. Greensboro,* 190 N. C., 611. The leading authorities in other jurisdictions are assembled in the cases of *Horrabin v. City of Des Moines,* 199 N. W., 988; and *Griffiths & Son v. National Fireproofing Co.,* 141 N. E., 739. Both cases are reported with extensive annotations in 38 A. L. R., 554 *et seq.*

The principles of law applicable to the question are well established, but the main difficulty consists in applying the principles to a given state of facts. The authorities referred to, however, disclose certain tests whereby the application of the principle may be determined. Thus in *Horrabin v. Des Moines,* the Court said: "One of the tests in determining whether there may be contribution or indemnity in favor of one joint wrongdoer against another is whether the former knew, or must be presumed to have known, that the act for which he has been held liable was wrongful." Again in *Griffiths & Son v. National Fireproofing Co., supra,* the Illinois Court stated the principle thus: "Where one of them

is only passively negligent, but is exposed to liability through the positive acts and actual negligence of the other, the parties are not in equal fault as to each other, though both are equally liable to the injured person." . . . The further general principle is announced, however, in many cases, that where one does the act which produces the injury, and the other does not join in the act, but is thereby exposed to liability and suffers damage, the latter may recover against the principal delinquent, and the law will inquire into the real delinquency, and place the ultimate liability upon him whose fault was the primary cause of the injury."

The same tests announced in other jurisdictions have been recognized and applied in this State. For instance, in *Doles v. R. R.,* 160 N. C., 318, *Walker, J.,* in referring to the case of *Gregg v. Wilmington,* said: "The city did not actually coöperate with Wolvin in committing the wrong to the plaintiff's intestate. . . . Where two or more persons have participated in the commission of a wrong, the general rule undoubtedly is that a right to contribution or indemnity will not arise in favor of the one held responsible by the injured party."

Applying these tests to the case at bar, it appears that the defendant, J. A. Jones Construction Company, was charged with notice of the dangerous condition of the premises, occasioned by the probability of falling beams, bolts, rivets and other construction material. The danger was so apparent that the foreman of the Jones Construction Company complained to the architect and requested that he require its codefendant Markham to furnish adequate protection for the workmen. Nothing was done by either defendant. The defendant, Jones Construction Company, owed the plaintiff the positive and nondelegable duty to exercise ordinary care in furnishing a reasonably safe place to work. The record discloses an open and continuous violation of this positive duty, notwithstanding full and ample knowledge of the danger incident to the work. In truth, the jury found in response to the second issue that the plaintiff was injured by reason of the negligence of the Construction Company.

Under these circumstances it is apparent that the negligence of the Construction Company coöperated with the negligence of Markham, the steel erector. Both parties actively participated in the injury to the plaintiff. In the language of *Doles v. R. R., supra:* "The two acts concurred in producing the injury, and, upon the assumption that the express company was negligent, it and the railroad company were joint *tort-feasors,* as to the plaintiff and as between themselves, and there is no right of indemnity or contribution."

We are, therefore, of the opinion, and so hold, that the trial judge was correct in refusing to submit an issue as to primary and secondary liability.

There is another exception relating to the charge of the court. Even if it be conceded that the charge complained of constituted error, it was essentially miscroscopic error. Moreover, the trial judge repeatedly announced the correct principle as to the burden of proof.

No error.

W. M. STURGILL v. NEW YORK LIFE INSURANCE COMPANY.

(Filed 31 January, 1928.)

1. **Insurance, Life—Contract in General—Nature, Requisites, and Validity.**

   A stipulation in a policy of life insurance that it will not be valid until its delivery and the first premium paid, is valid and enforceable.

2. **Insurance, Life—Agent of Insurer—When His Acts Create Liability of Insurer—Principal and Agent—Negligence.**

   When the local agent of an insurance company has notified the applicant for a life insurance policy that the policy was ready for delivery, which, under its terms, was to be effective from its delivery and payment of the first premium, and is informed, in reply, that he would not be able to pay the premium until a certain date, and thereafter he was killed in an accident covered by the policy, without having either paid the premium or arranged with the insurer therefor or accepted the policy; and there is no evidence that the agent had been negligent in delivering the policy: *Held*, a judgment in plaintiff's favor in the beneficiary's action on the policy will be reversed on appeal.

CIVIL ACTION, before *Moore, J.*, at Spring Term, 1927, of WATAUGA.

On 2 October, 1925, Roosevelt Sturgill made application to the defendant company for a policy of life insurance. There was evidence that the application was signed about 6 October, 1925. At the time of making the application Sturgill was employed by the State Highway Commission and was working under the supervision of H. M. Tharington, who was his foreman. Tharington and Sturgill were living in Burlington. Thereafter, on 19 October, a policy of insurance was issued by the defendant and delivered to its agent, J. R. Hawkins, at Burlington, N. C. The application for said insurance contained, among others, the following stipulation: "That the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime," etc. Said policy of insurance was written for the face amount of $1,000, and provided double indemnity in the event of the death of the insured from accidental cause. The beneficiary named in the policy was William Sturgill, plaintiff in this case. When the agent received the policy on 19 October he went to the boarding place of Sturgill in

Burlington, in order to deliver the policy, and was informed that the applicant had moved or been transferred to Winston-Salem. Thereupon, on the next day, to wit, 20 October, 1925, the agent wrote to H. M. Tharington at Winston-Salem, N. C., the following letter: "The policies that you and Mr. Sturgill applied for have arrived, and were issued as applied for. I found out from the lady at your boarding house that you had left Monday morning for Salem, and I secured your address so I could notify you of the policies being issued. Shall I hold the policies until you come back? If so, give me an idea of how long you will be gone. If necessary, we might take care of it through the bank, if you are delayed in Salem. Let me know as to your decision on this matter." Tharington, who had also applied for a policy from said agent contemporaneously with Sturgill, replied to said letter on 26 October, 1925, as follows: "J. R. Hawkins, Burlington, N. C. Dear Mr. Hawkins: Did not get your letter until today. As I said at first, I will take $1,000. The $3,000 is a little more than I want. I don't know how long I will be here. If you can cut the policy down to $1,000, and send me the amount due, I will send check about the first of the month. Mr. Sturgill says he will take his up about the first also. If you can make the above change, please let me know at once the amount due for the first half. Very truly, H. M. Tharington."

Tharington, witness for plaintiff, testified that when he wrote the letter of 26 October, 1925, to the agent Hawkins, that Sturgill was present and knew that the letter was being written and that Sturgill saw the letter of 20 October, written by Hawkins; that both he and Sturgill were expecting to get their pay about the first of the month. On 3 November, 1925, Sturgill was killed in an automobile accident. Tharington was driving the car when Sturgill was killed. At the time of his death Sturgill had not received his pay from the Highway Commission. On 2 November, the day preceding the death of Sturgill, Hawkins went to the postoffice in Burlington for the purpose of sending the policies to Tharington and Sturgill C. O. D., but was informed by the postoffice authorities that the policies could not be transmitted that way, and he thereupon took the policies back to his office. On 4 November the agent saw an account of the death of Sturgill in the newspapers and returned Sturgill's policy to the branch office of the defendant at Charlotte. Thereafter the agent Hawkins sent the Tharington policy to Winston-Salem and Tharington acknowledged receipt of it on 6 November, 1925, and paid the premium to Hawkins on 9 November, 1925.

The plaintiff instituted this action against the defendant, alleging in substance that Hawkins, the agent of the defendant, carelessly and negligently failed and neglected to deliver said policy to Sturgill, and that by reason of the carelessness and negligence of the agent he had suffered

damage in the sum of $2,000, which was the amount due under the policy in the event of accidental death.

The issues and answers of the jury thereto are as follows: 1. Did Roosevelt Sturgill make application to the defendant for a life policy, and did the defendant accept the same and issue a policy on said application and deliver the same to its agent at Burlington, N. C.? A. Yes. 2. Did defendant's agent negligently and carelessly fail to deliver the said policy to the said Roosevelt Sturgill? A. Yes. 3. What amount, if anything, is the plaintiff entitled to recover? A. $2,000.

From judgment upon the verdict the defendant appealed.

Trivette & Comer and R. G. Bingham for plaintiff.
F. A. Linney and Cansler & Cansler for defendant.

BROGDEN, J. At the outset it is to be observed that the application for the insurance policy provided "that the insurance hereby applied for shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime," etc.

In *Powell v. Insurance Co.,* 153 N. C., 124, *Walker, J.,* speaking for the Court, said: "We do not see why an insurance company may not stipulate in its agreement to insure, that its risk shall not begin until some definite time in the future, or until some specified act has been done."

Again in *Turlington v. Ins. Co.,* 193 N. C., 481, *Connor, J.,* said: "It is expressly stipulated in the application therefor "that the company shall incur no liability under this application until it has been received, approved, and a policy issued and delivered, and the full first premium stipulated in the policy has actually been paid to and accepted by the company during the lifetime of the applicant." This is a valid stipulation; plaintiffs, having failed to show by the evidence that the policy sued on was issued and delivered during the lifetime of Richard C. Turlington, cannot recover thereon."

The plaintiff, however, insists that this cause of action is not based upon the contract, but upon tort growing out of the negligence of the agent of the defendant in failing promptly to deliver said policy during the lifetime and good health of the applicant. Plaintiff insists further that this case comes within the principle declared by this Court in *Fox v. Ins. Co.,* 185 N. C., 121. The defendant insists that the *Fox case* is contrary to the overwhelming weight of authority, and that it ought to be overruled.

The *Fox case* was the subject of sharp debate, as will appear by the various opinions filed in the cause. The governing principle in the case

is thus declared in the main opinion of the Court: "If the defendant's agent wilfully failed to deliver the policy within a reasonably short time after its receipt, during which time the plaintiff's intestate was in good health and ready, able, and willing to pay the premium on delivery, as stipulated, and plaintiff's intestate having thereafter become ill, the defendant could not withhold the delivery so as to release it from responsibility." The concurring opinion of *Adams, J.,* rests upon the following declaration: "I am convinced that a new trial should be granted, and the jury permitted to find from the evidence whether the intestate, while in good health, requested the agent to deliver the policy, and whether he was ready, able, and willing at that time to pay the premium; and, if so, whether the agent, carelessly disregarding the applicant's rights, failed to deliver the policy within a reasonable time thereafter."

These two ideas expressed in the main and concurring opinions are not identical, because in the main opinion the duty was imposed upon the agent "to deliver the policy within a reasonably short time after its receipt"; while in the concurring opinion the duty was imposed upon the agent to deliver the policy within a reasonable time after the request of such delivery by the applicant.

But it is unnecessary for us to determine whether the *Fox case* was correctly decided or not, because the facts in the present case preclude the application of the rule of liability announced by the Court therein. Immediately upon receipt of the policy the agent undertook to deliver it to Sturgill. He went to Sturgill's boarding house and found that he had been transferred to Winston-Salem. On the very next day he wrote Sturgill's foreman, for whom he also had a policy of the same kind, advising him of the receipt of the policies and requesting instructions. This letter was shown to Sturgill, and thereupon on 26 October the agent was advised that Sturgill, as a matter of fact, was not ready for the delivery of his policy at that time, but that he would be ready to take the policy and pay the premium about the first of the month. This instruction from Sturgill was clearly equivalent to a declaration to the agent that he was then not ready, able, and willing to pay the first premium, and would not be ready to comply with the terms of the contract until after the first of the month. Sturgill was killed before any advice was given to the agent of the defendant that he was ready to take the policy and pay the premium; indeed, Tharington testified that at the time of Sturgill's death they had not received their pay.

Under these facts and circumstances we are of the opinion that the plaintiff is not entitled to recover, and that the motion for nonsuit, duly made by the defendant, should have been allowed.

Reversed.

H. H. ENLOE v. H. A. RAGLE.

(Filed 31 January, 1928.)

1. Pleadings—Demurrer—Nature of Grounds.

A demurrer to pleadings may be taken to the whole complaint or to any of its allegations of causes of action, but will not be sustained if the pleadings, liberally construed are sufficient to sustain the causes therein, to which such objection is made. C. S., 512.

2. Pleadings—Demurrer—When Can Be Made—Dismissal.

A demurrer that the allegations of the complaint are insufficient to constitute a cause of action is equivalent to a motion to dismiss the action, and may be made at any time, even in the Supreme Court, or the Court may, *ex mero motu* take cognizance of the fact, and dismiss the action.

3. Partnership—Mutual Rights, Duties, and Liabilities—Actions Between Partners.

While ordinarily one partner cannot recover of another on account of a partnership, except after final settlement and accounting, there are exceptions when one partner has destroyed the *corpus* of the partnership, or converted it to his own use to the damage of the other.

4. Pleadings—Demurrer—Nature of Grounds—Partnership—Termination—Accounting.

Upon allegations in the complaint that a partnership existed between the parties, that the partnership solely consisted in the ownership and operation of two theatres, and that the right of the partners had been adjusted between themselves, but that contrary to the instructions of one of the partners the other had sold the theatre buildings at a greatly inadequate price, had received the purchase price and converted the same to his own use: *Held*, sufficient evidence of a wrongful conversion that would terminate the partnership, and a demurrer of the defendant, that an accounting first be had, is bad.

APPEAL by plaintiff from *Sink, Special Judge,* at July Term, 1927, of SWAIN. Reversed.

Frye, Randolph & Jones for plaintiff.
Bryson & Bryson for defendant.

CLARKSON, J. A general demurrer will not be allowed. A demurrer must distinctly specify the grounds of objection or it may be disregarded. It may be taken to the whole complaint or to any of the alleged causes of action stated therein. C. S., 512. A demurrer to the jurisdiction or that the complaint does not state facts sufficient to constitute a cause of action, will be treated as a motion to dismiss, and can be interposed *ore tenus* at any time, even in the Supreme Court. The Supreme

Court may raise the question *ex mero motu. Seawell v. Cole,* 194 N. C., p. 546. In this Court defendant, in writing and *ore tenus,* distinctly specified that the complaint does not state facts sufficient to constitute a cause of action. "(a) It alleges a partnership between plaintiff and defendant; (b) It fails to disclose a dissolution of said partnership; (c) It fails to allege a conversion of the partnership assets by the defendant or facts that would in law constitute a conversion; (d) It fails to allege an account of the partnership matters as between the said partners; (e) It is an action brought by one partner as against his copartner for partnership assets." The action will be considered on the demurrer as filed in this Court. The demurrer, although now in this Court, specifies the ground of objection cannot be sustained and must be reversed.

The principle set forth in *Seawell v. Cole, supra,* at p. 547, and repeatedly held by this Court: "But when a case is presented on demurrer, we are required by the statute, C. S., 535, to construe the complaint liberally, 'with a view to substantial justice between the parties,' and in enforcing this provision we have adopted the rule 'that if in any portion of it or to any extent it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn or however uncertain, defective and redundant may be its statements, for, contrary to the common-law rule, every reasonable intendment and presumption must be made in favor of the pleader.' *S. v. Bank,* 193 N. C., at p. 527, and cases cited. *Foy v. Stephens,* 168 N. C., p. 438; *S. v. Trust Co.,* 192 N. C., 246."

In the present action the complaint, together with the amended complaint, alleges a partnership in which plaintiff and defendant were equally interested in two theatres, and all necessary equipment, etc., owned and operated under the name of the Alcoa Theatre Company; that operation of said theatres were suspended; that a settlement was had "so that at the suspension of the two theatres as aforesaid all dealings connected with said partnership were closed and the plaintiff and defendant were square with each other, and the partnership owed no debts to creditors, and said theatres were never thereafter operated by said partnership"; that it was agreed between plaintiff and defendant that the two theatres and equipment should be sold under certain conditions, "but in utter disregard and in violation to the agreement between plaintiff and defendant, the defendant sold said two theatres, without notifying plaintiff, for the sum of $1,000, which was much less than the real value of said theatres and their equipment, and collected the money for the sale of the same, and has since wrongfully and unlawfully converted all of said money to his own use and has failed and

refused, and still refuses, to account to the plaintiff for any part of the same; that the defendant disposed of all the property belonging to the Alcoa Theatre Company, or to the plaintiff and defendant, and that said sale destroyed the partnership entity, and the plaintiff is advised and believes that this act of the defendant dissolved all partnership relations theretofore existing between plaintiff and defendant; that the said two theatres and equipment were reasonably worth $2,000, and that the defendant by his unlawful act and disobedience to the will of the plaintiff in selling said property is liable to the plaintiff for the real value of the property, to wit, $2,000," and demands judgment for $1,000, the one-half value of the property.

This Court, *Brogden, J.*, in *Pugh v. Newbern,* 193 N. C., at p. 260, citing numerous authorities, held: "The general rule is that one partner cannot sue another partner at law until there has been a complete settlement of the partnership affairs and a balance struck." At p. 261: "There are, however, well established exceptions to this general rule. A partner may maintain an action at law against his copartner upon claims growing out of the following state of facts: . . . (7) When the joint property has been wrongfully destroyed or converted."

Construing the complaint liberally, according to the rule laid down in the *Seawell case, supra,* the demurrer admits that there was a partnership; that the plaintiff was equally interested in the partnership property with defendant; that there was a full and complete settlement of all the debts of the partnership; that the net balance was divided between plaintiff and defendant—they "were square with each other"; that nothing was left except the theatres and equipment—practically a dissolution. It was agreed they were to be sold under certain condition, but the defendant sold all the partnership property belonging to the Alcoa Theatre Company and converted the proceeds of sale to his own use and refused to pay over to the plaintiff his part of the proceeds of sale, and the defendant is now justly due the plaintiff one-half the value of the partnership property.

In *Newby v. Harrell,* 99 N. C., at p. 156, it is said: "Among the exceptions to the general rule is the right of one partner to maintain an action against another for the destruction of the joint property, or its wrongful conversion. *Lucas v. Wasson,* 3 Dev. (14 N. C.), 398; Collyer on Partnership, sec. 382." *Cowan v. Buyers,* 3 Tenn., 53, 5 Am. Decisions, p. 668.

The *Newby case, supra,* is cited with approval in *Doyle v. Bush,* 171 N. C., p. 10. In that case Doyle and Bush were tenants in common, equal interest in a race horse named *Farmer Gentry.* The horse was in the possession of the defendant, and the jury found defendant sold him for $1,200, without consulting plaintiff. When plaintiff heard the horse

was sold by defendant he wrote him, and defendant answered he had received $400, and refused to pay plaintiff any part of the money, claiming they were not tenants in common in the horse, and converted the money to his own use. Plaintiff sued defendant for the wrongful conversion of the horse or for the wrongful conversion of the proceeds of the sale. A verdict of $600 for plaintiff was sustained.

20 R. C. L., at p. 931-2, says: "It has also been ruled that one partner may maintain an action against his copartner for the destruction of the joint property, or its wrongful conversion, or for injury to his individual property used in the business if such injury is the result of the negligence or tort of the copartner," citing *Newby case, supra.* Jaggard on Torts, Vol. 2, p. 732, lays down the following rule: "There are, however, circumstances which raise questions as to parties somewhat peculiar to conversion and trespass. Thus, as between cotenants, an action for conversion will not lie by one against the other, so far as the land is concerned. This is certainly true as to the legitimate use of the property; and the courts are averse to construing conduct of the tenant in common into an ouster. 'Short of destruction or something equivalent,' one tenant in common may exercise full rights of property over a chattel, in defiance of the wishes of the other coöwners. But any conduct on the part of a cotenant which amounts to an exclusion of the others from ownership renders him liable in conversion. A sale of the whole estate to a stranger is conversion; or the seizure of the whole common crop in denial of the rights of other cotenants." *Porter v. Alexander, ante,* 5.

The synopsis of the matter is well stated in note in *Frith v. Thomson,* 103 Kan., 395, 76 Lawyers Rep. Anno., 1918F, p. 1125: "The general rule, at least under the earlier decisions, based upon the theory that one partner cannot sue another at law for any matter growing out of the partnership except in an action for an accounting, which theory or rule is in turn founded upon the ground that until all of the affairs of the partnership are adjusted there can be no complete right of the parties as to any single transaction connected therewith—is that one partner cannot maintain an action for conversion of firm property against a copartner. It has also been said that this conclusion is due to the fact that possession is the foundation of an action for conversion, and that, generally speaking, all partners are equally entitled to possession. However, as subsequently shown, there are a number of exceptions to the general rule, as, for instance, where the firm property is so used or misused by one partner as to destroy it for partnership purposes and thus constitute an actual conversion and entitle an aggrieved partner to maintain trover for the conversion, or where the partnership venture involves but a single or a few transactions, and there are no complicated

accounts requiring equitable adjudication." In the note the *Newby case* is cited as a dictum, at p. 1127: "And see the dictum in *Newby v. Harrell* (1888), 99 N. C., 149, 6 Am. St. Rep., 503, 5 S. E., 284, to the effect that one partner may maintain an action against another for the destruction of the joint property, or its wrongful conversion." *Nixon v. Moore,* 194 N. C., p. 225, is not contrary to the view taken here.

Under the facts and circumstances of this case, we think the principle in the *Newby case* consonant with reason and justice—works no hardship—and the common-sense modern view.

For the reasons given the judgment below is

Reversed.

GILBERT C. WHITE COMPANY v. CITY OF HICKORY.

(Filed 31 January, 1928.)

1. Municipal Corporations—Public Improvements—Contracts— Cities and Towns.

Where, by provision of statute it is required that a contract to be binding upon a city, be signed in its behalf by its manager and by a member of its council, and that the contract be duly authorized by ordinance at a regular meeting: *Held,* a contract coming within these provisions, but signed only by its manager, without the signature of a member of the council, under authority of an ordinance so authorizing him to sign, is not void for nonconformance with the statute.

2. Same.

Where a city has accepted the proposition of an engineer to prepare plans and specifications for, and supervise the construction of an enlargement of its water supply to meet its demands thereon, upon a commission basis that will require payment for supervision at stated intervals during the progress of the work, the completion of which will extend the period beyond one year, the contract is to be regarded as a continuing one by interpretation of the law and provision of the statute applicable in this case.

3. Same.

Where there is express provision of a statute requiring a city in case of making a contract for its fiscal year to make an appropriation for its expenditures thereunder, and as to other contracts, the funds be available when they are executed: *Held,* that when such contract is made to extend beyond the fiscal year, and is a continuing contract, the statute, by its expressed terms, does not apply, and the contract is valid without an appropriation first made.

CIVIL ACTION, before *McElroy, J.,* May Term, 1927, of CATAWBA.

The plaintiff is a corporation organized and doing business under the law of North Carolina and is engaged in the business of furnishing

expert engineering services for the construction of water and power plants, street improvements, sewerage systems and other public works requiring expert engineering advice and supervision. The defendant, city of Hickory, owned a water plant "for the purpose of supplying an adequate water supply to its citizens and for extinguishing fires," and also for commercial purposes. The water plant was inadequate. Realizing the necessity of enlargement and repairs, the city council of defendant, on 1 December, 1922, sent out notices to various engineering firms, inviting proposals "from engineers for the purpose of employing an engineer to increase the city's water supply." In response to such notice various engineers submitted written proposals. The plaintiff submitted a proposal, dated 6 December, 1922, offering to "furnish engineering services on the work necessary to carry forward the work of construction to completion, including necessary studies, investigations and surveys of proposed sources of supply, and the preparation of all necessary maps, plans, specifications and drawings for submitting the work to contract and the direction of the work as consulting engineer." The compensation fixed in said proposal was as follows: "Our compensation for the above services shall be 4½% of the amounts that may be expended for waterworks (of which one-half is for plans and specifications and one-half for supervision of construction), and which shall be due and payable proportionately as the delivery of materials and the work of construction progresses. It is understood that we will first make the preliminary investigations and make a report to the council, and the charge for this investigation and report shall be the actual cost of making same (not exceeding $1,000), which said sum shall, however, be a part of our percentage fee." At a regular meeting of the city council of defendant, held 12 December, 1922, the foregoing proposal of the plaintiff was formally accepted by the mayor and city council. A resolution accepting same was duly passed, directing the city manager to sign the contract. Thereupon the plaintiff assembled its engineers to look over the ground and make all necessary preliminary investigations, studies, etc. This work proceeded until 10 May, 1923. On said date a special meeting of the city council of defendant was called "for the purpose of hearing Mr. Gilbert C. White, engineer, on the report of his firm for the proposed new gravity system of water for the city. After hearing Mr. White and a lengthy discussion on the different proposals of the report . . . it was moved . . . that the Gilbert C. White Company of Durham be instructed to prepare plans and specifications for the proposed gravity water supply for the city." Thereafter, on 15 May, 1923, the same resolution was again read and unanimously adopted. The work proceeded as before until 25 October, 1923. On said date a special meeting of the city council of defendant was held, and the minutes of

said meeting contained the following entry: "The Honorable Mayor stated that this special meeting was called for the purpose of hearing Mr. Gilbert C. White, engineer, of Durham, N. C., on the advisability of putting in gravity system of water supply for the city, also looking over the plans and specifications of same. After a lengthy discussion same was left over to a future date, and to notify Mr. White when it would be taken up." After the delivery of plans and specifications on 25 October, 1923, the matter of water improvement was discussed at a mass meeting in the defendant city. Said mass meeting was to be held on or about 14 November, 1923. On 8 February, 1924, the plaintiff was requested by the mayor of the defendant to make up an estimate, leaving out certain items in the original estimate, thus enabling the city to install the plant for less money than the original estimate of cost. The plaintiff complied with this request, and thereafter, on 21 March, 1924, prepared a condensed report which was printed in a newspaper published in the defendant city, the plaintiff having nothing to do with the publication thereof. On 4 October, 1924, the plaintiff wrote a letter to the defendant, enclosing a bill for services in the sum of $15,195.60, which was 2¼% of $657,360, said sum being the estimated cost of the proposed improvements. The defendant declined to pay the plaintiff anything on account of services rendered. The evidence tended to show that the plaintiff had actually spent $8,000 or $10,000 in preparing the plans and specifications and performing said services specified in the contract. The evidence further tended to show that it would have required from eighteen months to two years to have constructed the water system according to plans prepared and submitted by the plaintiff. It appeared in the evidence that the minutes of the defendant did not contain any appropriation for waterworks and sewer department to cover surveying and engineering work by the plaintiff, and that no appropriation had been made by the defendant for paying the plaintiff. The evidence further tended to show that the fiscal year of defendant for 1922 ended 30 April, 1923. At the conclusion of plaintiff's evidence the defendant moved for a judgment of nonsuit, which was granted by the court, and the plaintiff appealed.

McLendon & Hedrick and A. A. Whitener for plaintiff.
Self & Bagby and Bailey Patrick for defendant.

BROGDEN, J. The defendant seeks to uphold the judgment of nonsuit upon two grounds: (1) The charter of the defendant provides that "no contract shall be binding upon the city unless it has been signed by the city manager and by a member of the city council, who shall have been duly authorized to sign the said contract by an ordinance adopted at a

regular meeting of the city council," etc. (2) The restriction upon the exercise of municipal powers contained in 3 C. S., 2960, subsection (d), is as follows, to wit: "Enter into any contract involving the expenditure of money unless a sufficient appropriation shall have been made therefor, except a continuing contract to be performed in whole or in part in an ensuing fiscal year, in which case an appropriation shall be made sufficient to meet the amount to be paid in the fiscal year in which the contract is made." In determining the merits of the first proposition, it appears that section 7 of the charter of defendant, enumerating the powers of the city manager provides as follows: "He shall sign all contracts . . . as the city council may authorize and require." Section 13, subsection (d) of the charter, enumerating the powers delegated to the city council, provides: "It shall make or authorize the making of all contracts, and no contract shall bind or be obligatory upon the city unless made by ordinance or resolution adopted by the city council, or reduced to writing and approved by said council or expressly authorized by ordinance or resolution adopted by the city council." It is the plain intent and meaning of the sections of the charter referred to that all contracts shall be authorized by ordinance or resolution of the city council or approved by said council. In the case at bar, the resolution or ordinance employing the plaintiff was duly adopted by the governing body of defendant, reduced to writing and duly approved in regular session assembled. The contract was signed by the city manager, the chief executive officer of the city, under the provisions of the charter. Under these circumstances the failure of a member of the council to sign the contract with the city manager was no more than an irregularity or informality, which in nowise vitiates the contract if otherwise valid.

The more serious question presented by the record relates to the construction of 3 C. S., 2960, subsection (d). The Municipal Finance Act expressly repeals all acts, general, special, private or local, relating to bonds or other obligations of a municipality. So that the provisions of the city charter of defendant, with respect to its fiscal obligations, are superseded by the Municipal Finance Act. Subsection (d) of 2960, expressly prohibits a municipality from entering into any contract involving the expenditure of money unless a sufficient appropriation shall have been made therefor, unless such contract be a "continuing contract." A continuing contract under the law is expressly excepted from the operation of said subsection (d). The vital point in the case, therefore, is whether or not the contract was a "continuing contract" as contemplated by law. A definition of a "continuing contract" depends largely upon the facts of particular cases. In *Novelty Co. v. Andrews,* 188 N. C., 59, the question of "continuing guaranty" was considered by this

Court. Of course, a guaranty is a contract of a particular nature. *Clarkson, J.,* quoted with approval the following principle of law: "Where by the terms of the guaranty it is evident that the object is to give a standing credit to the principal to be used from time to time, either indefinitely or for a certain period, it is generally deemed a continuing guaranty. . . . If the object of the guaranty is to enable the principal to have credit over an extended time, and to cover successive transactions, it is a continuing one." The governing principle in such contracts is successive transactions between the parties over a definite or indefinite period of time. So in the present case, the contract between the parties contemplated successive transactions over an indefinite period of time. Indeed, the statute itself defines "continuing contract" as contemplated therein. Such a contract is one "to be performed in whole or in part in an ensuing fiscal year." The Municipal Finance Act provides that the fiscal year of every municipality shall begin either on the first day of June or the first day of September, as the governing body may determine. It appears, however, from the present record that the fiscal year of defendant began on 1 May and ended 30 April. The contract was made by the defendant on 12 December, 1922. Hence this contract was made during the fiscal year and no appropriation could possibly have been made for the work in the budget which the law required to be presented not earlier than one month before nor later than one month after the beginning of each fiscal year. On 25 October, 1923, when the plans were ready to be submitted to the defendant another fiscal year had ensued. On 4 October, 1924, when the plaintiff rendered its bill for services, still another fiscal year had ensued. The evidence introduced at the trial was to the effect that the completion of the improvement would have required a period of eighteen months to two years, not including the time requisite for making preliminary studies, investigations, maps, sketches and detailed plans to be submitted to bidders. Obviously, under these circumstances, the contract in controversy contemplated the performance of services extending over a period of more than one fiscal year. Therefore, if the contract existing between the plaintiff and the defendant was a continuing contract, the failure of defendant to make an appropriation for the fiscal year 1922-23 did not affect the validity of the contract, for the reason that a continuing contract is expressly excepted from the operation of the restriction set forth in subsection (d), *supra.* In the event of a continuing contract the law expressly required the defendant to make an appropriation to meet the indebtedness so incurred.

Upon the present record we hold that the trial judge was in error in sustaining the motion of nonsuit, and said judgment is

Reversed.

STATE v. THURMAN NANCE.

(Filed 31 January, 1928.)

1. Criminal Law—Evidence—"Character Evidence."

In a criminal action the defendant may put his character in issue as substantive evidence of his guilt or innocence, without being himself a witness, and, when his character is thus in issue, the State may introduce evidence of his bad character.

2. Evidence—Competency—"Character Evidence."

The rules of law governing the admissibility of character evidence in criminal and civil actions are different, except that certain civil actions, such as libel and slander, seduction, etc., where character is involved, the rules governing criminal actions may apply. Rules to be applied on this question enumerated by BROGDEN, J.

3. Trials—Instructions—Error—Appeal and Error.

When in an action before a jury in a criminal case a controversy arises between counsel as to the admissibility of evidence against the character of defendant, and the defendant's counsel argues to the jury that such evidence is not introduced because there is none, and the court instructs the jury that the State could not put on such evidence: *Held*, under the circumstances in this case, such instruction is reversible error.

CRIMINAL ACTION, before *Harding, J.*, at June Term, 1927, of FORSYTH.

The defendant was convicted of seduction, and appealed from a judgment sentencing him to serve a term of three years in the State prison.

Benbow, Hall & Benbow and A. D. Folger for defendant.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

BROGDEN, J. There was sufficient evidence upon all the essential elements of the crime to be submitted to the jury, and the only exception meriting serious consideration occurs upon the following excerpt from the record: "During the argument to the jury of Mr. F. B. Benbow, one of the counsel for the defendant, he turned to the acting solicitor and said, in substance: 'Why didn't you put witnesses on the stand to show the defendant's bad character? You scoured the country with a fine tooth comb for other witnesses against the defendant, but you dared not offer witnesses as to his bad character because you could not find them.'"

The same counsel repeated this statement throughout the course of his argument.

During the progress of the concluding argument of Mr. Webster, acting Solicitor for the State, Mr. Folger, of counsel for the defendant, objected to the argument of Mr. Webster, which was to the effect that the State could not attack the character of the defendant, since the defendant did not go on the stand; the court did not rule on said objection at that time, and at the close of Mr. Webster's argument Mr. Hall, of counsel for the defendant, again objected to the argument of Mr. Webster, and made the following remarks:

"Brother Webster argued to the jury that the State couldn't attack the character of the defendant because the defendant did not go on the stand. Your Honor will recall that the character of the defendant was put in evidence, and the State could have put any number of witnesses on the stand to rebut that."

The Court: "I understand the rule to be that the State cannot show any witness' character unless the witness goes on the stand. The defendant may offer evidence to show his character whether he goes on the stand or does not go on the stand. The defendant may offer evidence to use substantively, and if he goes on the stand, also as to his credibility. If he does not go on the stand it is only substantive. The State may offer evidence bearing on his credibility. I think that is the rule of evidence in North Carolina."

Mr. Webster: "I understand that is what I argued to the jury."

To the action of the court in overruling the defendant's objections to the foregoing argument and to the foregoing statement by the court, to the jury, the defendant excepts."

This quotation from the record presents for review an aspect of character evidence. Beginning with *MacRae v. Lilly,* 23 N. C., p. 118, and running in continuous sequence through *S. v. Colson,* 193 N. C., 236, the question of the admissibility of character evidence has been the subject of extended and minute judicial deliberation. At the outset it must be borne in mind that character evidence is governed by different rules in civil and criminal actions. Ordinarily in a civil action evidence of the character of the parties and witnesses is admissible only as affecting their credibility. The rule may be otherwise in actions for libel and slander, seduction or other similar cases in which the character of one or more of the parties or principals is directly involved. *In re McKay,* 183 N. C., 226. And further, in civil actions, if the defendant has not been examined as a witness and his character is not called in question by the nature of the action itself, evidence of bad character cannot be offered by the adverse party. In such a case the defendant cannot even offer evidence of his good character. *Marcom v. Adams,* 122 N. C., 222.

However, in criminal actions a different principle prevails. Certain rules regulating the competency or admissibility of character evidence have been evolved in the decisions of this State. Some of the general rules receiving the stamp of judicial recognition are as follows:

1. Every person accused of a crime, either felony or misdemeanor, has a right to offer in his defense testimony as to his good character, and when such testimony is so offered it is substantive evidence of the fact, and may be so considered by the jury. *S. v. Hice,* 117 N. C., 783; *S. v. Morse,* 171 N. C., 777. This right does not depend upon the fact that a defendant testifies in his own behalf, but it is limited to evidence of general character, and when such evidence of general character is offered, immediately the prosecution has the right to offer evidence of the defendant's bad character either by cross-examination or by other witnesses.

2. If a defendant testifies in his own behalf, but offers no evidence as to his character, the State may offer evidence of his bad character, but such evidence should affect only his credibility as a witness. *S. v. Traylor,* 121 N. C., 674.

3. A party offering a character witness can only prove the general character of the person inquired about, but the witness of his own accord may say in what respect the character of such person is good or bad; or the adverse party on cross-examination may test the witness by eliciting such statements. *S. v. Daniel,* 87 N. C., 507; *S. v. Hairston,* 121 N. C., 579; *S. v. McKinney,* 175 N. C., 784; *S. v. Butler,* 177 N. C., 585.

4. When a defendant offers evidence of his good character the State may offer evidence of his bad character, "but cannot, by cross-examination or otherwise, offer evidence as to particular acts of misconduct." *S. v. Holly,* 155 N. C., 485; *S. v. Adams,* 193 N. C., 581.

5. Where an impeaching or sustaining character witness is offered, he must be qualified by showing whether or not he knows the general character or reputation of the person about whom he proposes to testify. If he does not meet this qualification, he should be stood aside. *S. v. Parks,* 25 N. C., 296; *S. v. Colson,* 193 N. C., 236. This rule is amplified by *Clark, C. J.,* in *Edwards v. Price,* 162 N. C., 244, in the following language: "The party himself, when he goes upon the witness stand, can be asked questions as to particular acts, impeaching his character, but as to other witnesses it is only competent to ask the witness if he 'knows the general character of the party.' If he answers 'no,' he must be stood aside. If he answers 'yes,' then the witness can, of his own accord, qualify his testimony as to what extent the character of the party attacked is good or bad. The other side, on cross-examination, can ask as to the general character of the party for particular vices or

virtues. But it is not permissible either to show distinct acts of a collateral nature nor a general reputation for having committed such specified act."

6. In all criminal prosecutions, certainly those involving moral turpitude, the defendant may elect to put his character in issue and thus produce evidence of his good reputation and standing in the community; but if this be not done, the State cannot offer evidence of his bad character, unless and until he has been examined as a witness in his own behalf, and even then—the defendant not electing to put his character in issue—the impeaching testimony is permitted to affect only his credibility as a witness, and not the question of his guilt or innocence. Of course, in proper instances, in criminal cases, where the defendant chooses to put his character in issue, the pertinent evidence, *pro* and *con*, then becomes substantive proof, and may be considered by the jury as such. *Stacy, C. J.*, in *S. v. Colson*, 193 N. C., 236.

The rules of admissibility of character evidence, so far as they are pertinent to this appeal, may be summarized in a few clear-cut propositions. In the event a defendant, charged with crime, goes upon the witness stand, and testifies in his own behalf and offers no evidence as to his good character, the State can thereupon offer testimony as to his bad character, and such testimony cannot be considered upon the question of his guilt or innocence, but only upon his credibility as a witness. In such event, if the defendant in addition to testifying as a witness, offers testimony as to his good character, then such testimony so offered is substantive testimony to be considered by the jury upon his guilt or innocence, and also upon his credibility as a witness. Thereupon the State may offer evidence of his bad character. Such testimony so offered by the State may be considered by the jury as substantive evidence upon guilt or innocence, and in addition, upon the credibility of the testimony of the defendant as a witness. If the defendant does not go upon the witness stand and offers no evidence of his good character, then the door is shut and the State cannot either directly or indirectly produce evidence of bad character. If the defendant does not go upon the witness stand, but offers evidence of his good character, the door swings open and the State can thereupon offer evidence of his bad character, which must be considered as substantive evidence upon the question of guilt or innocence.

Applying these principles of law to the facts presented by the record, it appears that the defendant did not go upon the witness stand, but did offer evidence of his good character. It further appears that during the progress of the argument of the case, a controversy arose between counsel for the State and defendant as to whether the State could offer evidence of the defendant's bad character. Counsel for the defendant challenged

counsel for the State to show why the State had not produced evidence of defendant's bad character, and contended before the jury that the State had failed to produce evidence of bad character for the reason that it was impossible to find witnesses who would so testify. Counsel for the State, replying to this argument, contended before the jury that the reason the State had failed to offer testimony as to the bad character of the defendant was due to the fact that the State could not offer such testimony because the defendant had not been upon the witness stand as a witness in his own behalf. The point at issue was thus sharply drawn before the jury. The trial judge announced a proper rule under certain circumstances, but used this language: "If he does not go upon the stand, it is only substantive. The State may offer evidence bearing on his credibility. I think that is the rule of evidence in North Carolina." This statement of the court was doubtless an inadvertence, because the State cannot offer evidence of bad character bearing upon the credibility of a defendant's testimony when the defendant is not a witness or does not testify in his own behalf. By reason of the pointed and unequivocal manner of presenting the question before the jury, we are of the opinion that the defendant was entitled to have the jury instructed that the State could have offered evidence of defendant's bad character by reason of the fact that the defendant had put his character in issue by offering testimony of his good character. By virtue of the peculiar circumstances disclosed by the record and the erroneous interpretation of the law by the trial judge, the jury might have concluded that the State, under the circumstances, could not offer evidence of defendant's bad character. In this situation and under the particular facts disclosed by the record, we cannot say, as a matter of law, that this was harmless error, and therefore award a

New trial.

W. S. FORBES AND J. R. COLE, TRADING AS GLENN COMMISSION COMPANY, v. DREXEL KNITTING MILL COMPANY.

(Filed 31 January, 1928.)

1. Contracts—Requisites and Validity—Acceptance.

A written contract for the purchase of certain yarns by the authorized officer of a manufacturing company containing a provision that if the yarn did not come up to specifications it was to be returned to the plaintiffs, agents of the seller, acting upon commission, who were then to supply yarn that met the requirements of the contract, will be upheld by the courts when it is made to appear that no fraud was practiced in its pro-

curement, and that the one who executed the contract for the purchaser could have read and understood its terms and was afforded an opportunity to do so, but executed the contract without reading it.

2. Contracts—Actions for Breach.

Where the purchaser of yarns has violated its contract without legal excuse, by refusing to accept certain shipments because of inferiority of grade, instead of requiring the seller to supply other yarns that came up to the requirements of his contract, and has notwithstanding, used the yarns supplied, it is liable for the contract price, in the seller's action to recover it.

APPEAL by defendant from *McElroy, J.*, and a jury, at June Term, 1927, of BURKE. No error.

The first cause of action is brought by plaintiffs against defendant to recover the price of certain yarns, under contract of 13 November, 1924: "The Glenn Commission Co., of Richmond, Va., sells and Drexel Knitting Mill Co., Drexel, N. C., buys the following yarn subject to terms, quality as specified and upon conditions agreed to—no oral statements are binding—40,000 lbs. count 15/1 price 45½ put in cones. Yarn sold: *Sulphur black and white mock twist as spun by Union Mfg. Co.* Shipped January through August, 1925, or as near as possible to such time." Sec. 5. *"The quality of the yarn sold shall be equal to the average running quality of the manufacturer, with no other warranty. No inferiority in quality shall constitute cause for change of terms, conditions or cancellation of any part of contract. In case of such inferiority, the yarn received shall not be used or converted, and buyer agrees to be responsible for said yarn until delivered to carrier at seller's request, and the seller must replace with equal quantity of the grade sold, unless otherwise mutually adjusted. If said yarn is used all complaint shall be deemed waived."*

It is alleged by plaintiffs that after certain shipments of the yarn had been made under the contract, accepted and used, about 19 February, 1925, in violation of the terms of the contract, defendant undertook to cancel same and refused to comply with the contract and receive any further deliveries, contending the yarn was of "inferior quality"; plaintiff protesting, ready, able and willing, and offering to fulfil their part of the contract.

At the time of the refusal of defendant to comply with the contract, "plaintiffs had shipped 8,122 pounds of yarn in six several shipments, beginning on 27 December, 1924, and ending on 5 February, 1925, all of which had been accepted, used and paid for (except the last shipment) without objection or exception, and another shipment was on the way, having been shipped from Union Point, Georgia, prior to notice of the attempted cancellation of the contract by defendant."

Plaintiff prays damages for $50.92 returned yarns and freight charges. Damages sustained on remaining 31,878 lbs. of yarn contracted for $544.77, and amount due plaintiffs, yarn received and wrongfully deducted, $59.63.

For a second cause of action: Certain cotton yarn "to be manufactured by the Jennings Cotton Mill, and pursuant to the terms of said contract the plaintiffs did sell and deliver to the defendant a large quantity of cotton yarn which was received, accepted and used by the defendant. That two invoices of said yarn so delivered to and accepted and used by the said defendant and of the value of $755.25, and for which the defendant contracted and agreed to pay said sum it has refused and declined to pay and is indebted to the plaintiffs in said sum," the total damages claimed being $1,410.57.

The plaintiffs are in the business of selling cotton yarns in Richmond, Va., and the contract is accepted as made at Richmond, Va. The defendant's place of business is Drexel, N. C. The yarn, under the first cause of action, was shipped from Union Manufacturing Co., Union Point, Ga.

The defendant alleges actionable fraud in procuring the contract to be signed. That the type of hosiery yarn contracted for was known to the hosiery trade as "sulphur black and white mock twist." That the yarn shipped was an *inferior grade.* Defendant admits owing the plaintiffs $755.25, under the second cause of action, but held the amount on account of damages owing defendant from plaintiffs for the alleged actionable fraud practiced on it arising out of the first contract in first cause of action. Defendant sets up counterclaims for damage.

At the trial the record discloses the following: "At the close of the defendant's testimony the plaintiffs moved for judgment as of nonsuit upon the two counterclaims pleaded in the answer, that is to say, the claim of $1,800 asserted in paragraph four, of the further answer of the defendant, on account of the fact that the 8,000 (8,122) pounds of yarn accepted and used by the defendant was worth twenty cents per pound, instead of forty-five cents per pound, also as against the counterclaim of $780 for breach of the contract in failing to deliver 31,878 pounds of yarn, same being the balance remaining undelivered of the 40,000 pounds contracted to be delivered, action sustained, and defendant excepted. At the close of the evidence in the case, and after the court had sustained the plaintiffs' motion for judgment as of nonsuit, as to the causes of action set up in the defendant's counterclaim, the plaintiff states in open court that they waive any right to recover any amount set up in the complaint in this action, except as to the sum of $755.35, which he alleges is due them for yarn shipped to the defendant company, manufactured by Jennings Cotton Mill, with interest from 30 July,

1925. And this amount, except as to the interest, the defendant admits would be due the plaintiff, but for the matters set up by way of defense and counterclaim in its answer. The court, being of the opinion that under the pleadings and evidence in the case, that the plaintiff is entitled to recover this amount, notwithstanding the fact that there may have been fraud in securing the execution of the contract for the shipment of the yarn from the Union Manufacturing Company, declined to submit any issue except as to the indebtedness of the defendant to the plaintiff as to the Jennings contract. To this ruling of the court the defendant excepts. The defendant having agreed that if the plaintiffs are entitled to recover in this amount, that said amount should bear interest from 30 July, 1925. The court thereupon orders that judgment be entered against the defendant for the said sum of $755.25, with interest thereon from 30 July, 1925."

The necessary facts will be set forth in the opinion.

S. J. Ervin and S. J. Ervin, Jr., for plaintiffs.
Spainhour & Mull for defendant.

CLARKSON, J. The plaintiffs, who are in the business of selling cotton yarns, live in Richmond, Va. The defendant's place of business is in Drexel, N. C., and the yarn, the subject of the controversy, was shipped by order of plaintiffs to defendant under the contract from Union Manufacturing Co., Union Point, Ga., to defendant at Drexel, N. C.

It is not denied that under the contract plaintiff had shipped to defendant 8,122 pounds of the 40,000 pounds contracted for, in six shipments, and defendant accepted, used and paid for same, and then stopped shipments on the ground that the yarn was an inferior quality. That defendant contends it purchased a good grade under the contract, well known to the hosiery trade as *sulphur black and white mock twist,* manufactured especially for and extensively used in the knitting mill trade. The defendant sets up actionable fraud in procuring the contract and alleges damages. This action is governed by the terms of the contract, which is in writing.

In *Colt v. Kimball,* 190 N. C., at p. 172-3, *Varser, J.,* speaking for the Court, citing a wealth of authorities, said: "Defendant's testimony shows that he is a man of education and prominence, accustomed to the transaction of business, and of much experience, with more than an average education, who has served on the board of education for Vance County for many years. It was his duty, unless fraudulently prevented therefrom, to read the contract, or, in case he was not able to read the fine print without stronger glasses, to have it read to him. This rule

does not tend to impeach that valuable principle which commands us to treat each other as of good character, but rather enforces along with it the salutary principle that each one must 'mind his own business' and exercise due diligence to know what he is doing. Having executed the contract, and no fraud appearing in the procurement of the execution, the Court is without power to relieve the defendant on the ground that he thought it contained provisions which it does not. He is concluded thereby to the same extent as if he had known what due diligence would have informed him of, to wit, its plain provisions that the agent had no authority to make agreements other than those contained therein, and that such agreements, if made, were not a part of the contract." *Furst v. Merritt,* 190 N. C., 397; *Dunbar v. Tobacco Growers,* 190 N. C., 608; *Hoggard v. Brown,* 192 N. C., 494; *Finance Co. v. McGaskill,* 192 N. C., 557. It will be noted that the language of the opinion is, *"It was his duty, unless fraudulently prevented therefrom, to read the contract."*

R. O. Huffman testified for the defendant that he lived in Morganton, and was secretary and treasurer of the defendant company, located at Drexel. Accompanying the contract was a letter: "Confirming a telephone conversation with Mr. Huffman, and enclosed our contract number . . . for a certain quantity of yarn, sulphur black and white (mock) twist at such and such a price. That is the substance of the letter. Those figures and prices correspond with the contract that was attached to the letter. . . . I signed one copy and returned one copy." On cross-examination: "I am frank to say that I did not read the contract. I am a college graduate and can read. . . . I knew that they made this contract with me and agreed to sell this yarn to me at a certain price, and that they had another contract with the Union Mills in order to get it, and I knew that they had entered into a contract and agreed to pay for it. . . . My recollection is that we used every shipment that we took out of the depot. That one we did not take out of the depot I guess they paid the freight on it back. I think it was returned. *We used the yarn after we discovered the inferiority in the yarn, and knew that it was inferior when we used it.* . . . No, sir, I did not notice that stipulation in there until we were sued, that we were not to use the yarn if it was inferior. . . . The contract says that this yarn that we contracted for was sulphur black and white mock twist, 15 single, the average run of the mill of the Union Manufacturing Company. I read that much of it."

It is not denied by defendant that under the contract 8,122 pounds, in six several shipments, had been made by plaintiffs to defendant, used and paid for by defendant. This action is bottomed on the contract, and the defendant is bound by its terms: *"If said yarn is used all complaint shall be deemed waived."* Then again, *"No inferiority in quality shall*

constitute cause for change of terms, conditions or cancellation of any part of the contract." The contract further provides if the yarn is inferior, the seller must replace with equal quantity of the grade sold, and the yarn received shall not be used or converted and the buyer agrees to be responsible for yarn until delivered to carrier at seller's request.

The terms were violated by defendant. The defendant's agent is a college graduate and signed the contract. The high position he occupied with defendant company indicated that he was a man of business capacity, with his "eyes wide open," defendant's agent signed the contract—no trick, artifice or contrivance is shown. He was not lulled into security or thrown off his guard. He said: "I signed one copy and returned one copy." "I am frank to say I did not read the contract." There is no evidence of fraud in the procurement of the execution of the contract.

There are certain exceptions to the general rule not applicable here. See *Oil and Grease Co. v. Averett,* 192 N. C., 465; *Butler v. Fertilizer Works,* 193 N. C., 632.

It may be, from defendant's evidence, a hard contract, but courts are called upon only to construe and not make contracts. If the contract is a hard one, it is the fault of the makers, but all are bound by the terms.

"In *Lea v. Johnson,* 31 N. C., 19, *Pearson, J.,* said: 'Hard cases are the quicksands of the law.' In other words, a judge sometimes looks so much at the apparent hardship of the case as to overlook the law." *Leak v. Armfield,* 187 N. C., at p. 628.

For the reasons given, we find in the judgment below

No error.

JOHN W. PARKER, Z. D. COBB, J. H. TUGWELL, AND A. F. SHIRLEY, ON BEHALF OF THEMSELVES AND OTHER CITIZENS AND QUALIFIED ELECTORS AND TAXPAYERS OF JONAS WILLIAMS SCHOOL DISTRICT, GREENE COUNTY, v. J. E. DEBNAM, W. D. COBB, W. A. DILDY, J. E. ALBRITTON, AND L. A. MEWBORN, CONSTITUTING THE BOARD OF EDUCATION FOR GREENE COUNTY, AND H. G. ROBERTSON, COUNTY SUPERINTENDENT OF PUBLIC INSTRUCTION OF GREENE COUNTY.

(Filed 31 January, 1928.)

1. Schools and School Districts — Public Schools — Consolidation of Districts.

Where a county has adopted the county-wide plan or organization for its public schools, and its board of education has consolidated, in good faith, two contiguous school districts with regard to the convenience of those attending the schools of each, and with regard to their better school conveniences and instruction, and at a less cost of maintenance in the consolidation, so much will be upheld in our courts. 3 C. S., 5481.

2. Appeal and Error—Review—Presumptions.

Held, that the facts found by the lower court that the consolidation of two contiguous public school districts was made by the county board of education was under the provisions of 3 C. S., 5481, are supported by the evidence, and though the evidence is reviewable by the Supreme Court on appeal, the findings and conclusions of law thereon are presumed correct, and the burden is on the appellant to show error.

APPEAL by plaintiffs from *Nunn, J.,* at Chambers in the city of New Bern, 6 July, 1927. From GREENE. Affirmed.

The plaintiffs bring this action against the defendants to restrain them from consolidating Jonas Williams School District with the Walstonburg School District and to provide in the Jonas Williams School District at least a six months school, as provided by the Constitution.

The following findings of fact, conclusions of law and judgment were rendered: "This cause coming on to be heard before his Honor, R. A. Nunn, judge, at Chambers in the city of New Bern, N. C., upon the notice to the defendants to show cause why the restraining order heretofore granted in this cause should not be continued to the final hearing, and being heard upon the pleadings, affidavits and records offered in evidence, from which the court finds the following facts, to wit:

(1) That the plaintiffs are residents of Jonas Williams School District, in Greene County, North Carolina.

(2) That the defendants are members of the board of education of Greene County, except the defendant, H. G. Robertson, who is superintendent of public instruction for the said county, and as such are charged with the duty under the law of operating the public schools and maintaining the public school system in said county.

(3) That the Jonas Williams School District is contiguous to the Walstonburg School District, both of said districts being special tax districts, and that on and prior to 27 May, 1927, the Jonas Williams District had a special school tax rate of thirty cents and the Walstonburg District had a special school tax rate of forty-five cents.

(4) That the Walstonburg School District has, located at Walstonburg, N. C., a commodious modern brick school building of fourteen rooms, employing twelve teachers, and that the children from the outlying portion of said district are transported to and from said school by motor trucks.

(5) That the Jonas Williams School is an old, two-room wooden structure located four miles from the Walstonburg School and is not equipped with the necessary facilities for the proper instruction of the children of said district.

(6) That the enrollment at the Jonas Williams School for the school year 1926-1927 was forty-three and the average daily attendance was 27.46.

(7) That the Walstonburg School is not only a modern brick structure well lighted and steam heated, but that it is sufficiently large and amply equipped to take care of the children from the Jonas Williams School District without the employment of an additional teacher.

(8) That the board of education has refused to provide in its school budget funds for the operation of the Jonas Williams School for the ensuing year, and in so doing acted in good faith and in the honest exercise of its discretion and authority in an effort and for the sole purpose of improving the educational system of Greene County, and to provide better school facilities and advantages for the children of the Jonas Williams School.

(9) That the county of Greene has a county-wide plan or organization of schools, adopted 20 August, 1925, pursuant to and in compliance with the provisions of section 73(a), Article six of the Public School Law of North Carolina, codification of 1923; Public Laws 1923, ch. 136, Art. 6; 3 C. S., 5481; and since said date the board of education has worked under said plan and the several modifications thereof subsequently made in conformity to the requirements of Public School Law of North Carolina, Public Laws 1923, ch. 136, Art. 6; Public Laws 1924, Extra Session, ch. 121, sec. 2.

(10) That on 27 May, 1927, the board of education of Greene County, by resolution unanimously adopted, consolidated the Jonas Williams School District with the Walstonburg School District pursuant to and in accordance with the county-wide plan or organization of schools. That said consolidation of districts was made after first giving the committeemen and patrons of the Jonas Williams District full opportunity to be heard upon the subject, and that the acts of the board of education in consolidating the districts were done and performed in good faith and in an honest exercise of its discretion and authority in an effort and for the sole purpose of providing better school facilities for the children of the Jonas Williams School District and to improve the educational system of the county of Greene.

From the foregoing findings of fact the Court is of the opinion and concludes that in law:

(1) That the acts of the board of education of Greene County, in refusing to provide funds for the further operation of the Jonas Williams School were in all respects valid and legal.

(2) That the board of education having adopted a county-wide plan or organization of schools in conformity to statute, the acts of said board in consolidating the Jonas Williams School District with the Walstonburg School District were in all respects valid and legal.

Whereupon, it is considered, ordered and adjudged by the court that the temporary injunction and restraining order heretofore issued in this

cause be and the same is hereby dissolved. It is further ordered, considered and adjudged that the plaintiffs pay the costs to be taxed by the clerk.

The plaintiffs assign the following as error:

(1) For that the court erred in finding as a fact that the county of Greene had a county-wide plan of consolidation adopted in said county in accordance with the provisions of section 73-a, of the School Law of North Carolina, codification of 1923, chapter 136, Article 6; 3 C. S., 5481, or that the board of education has worked under any plan of consolidation as contemplated by said section, or the amendments thereto.

(2) For that the board of education did not consolidate the Jonas Williams School District with that of the Walstonburg School District in accordance with a county-wide plan of consolidation of schools in said county, and the court erred in so finding.

(3) For that the court erred in holding as a matter of law that the defendant board of education had a right to refuse to provide a school in the Jonas Williams School District.

(4) For that the court erred in holding as a matter of law that the defendant board of education had adopted a county-wide plan of the consolidation of the schools of Greene County and that of the conduct of the said defendant board in connection therewith were legal and valid.

(5) For that the court erred in dissolving the restraining order issued in said cause, and in refusing to require the defendant board to provide adequate school advantages in said Jonas Williams School District as is required by statute.

Albion Dunn and Shaw & Jones for plaintiffs.
J. Paul Frizzelle for defendants.

CLARKSON, J. The Jonas Williams School District is opposed to a consolidation with the Walstonburg School District. 3 C. S., 5481 (Public Laws 1923, ch. 136, sec. 73-a), in part is as follows: "The county board of education shall create no new district nor shall it divide or abolish a district, nor shall it consolidate districts or parts of districts, except in accordance with a county-wide plan of organization, as follows: (1) The county board of education shall present a diagram or map of the county showing the present location of each district, the position of each, the location of roads, streams and other natural barriers, the number of children in each district, the size and condition of each school building in each county. The county board of education

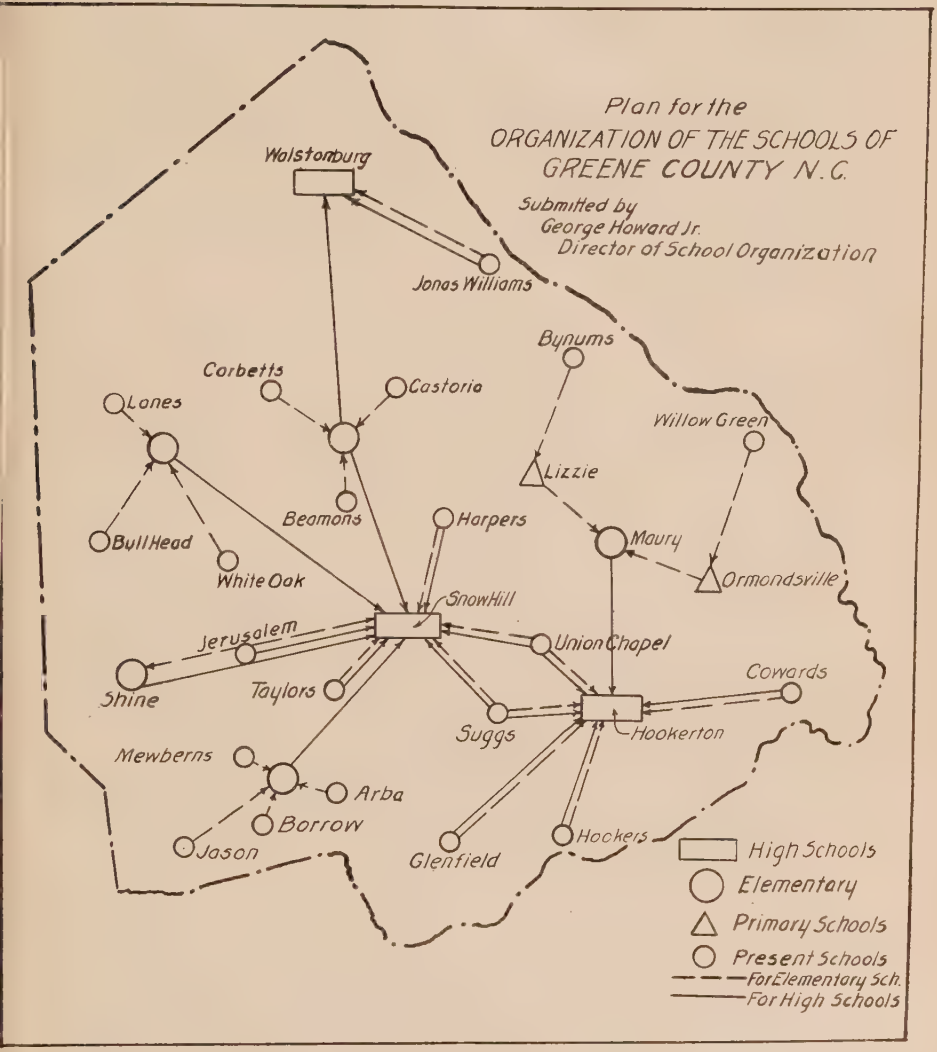
shall then prepare a county-wide plan for the organization of all the schools of the county. This plan shall indicate the proposed changes to be made and how districts or parts of districts are proposed to be consolidated so as to work out a more advantageous school system for the entire county," etc.

Then the methods of consolidating school districts are set forth in detail by the statutes. See Public Laws 1923, ch. 136, Art. 6; Public Laws 1924, Extra Session, ch. 121, sec. 2; 3 C. S., ch. 95, Art. 10. The findings of fact by the court below is to the effect that the above statutes have been complied with and the county-wide plan was adopted 20 August, 1925, for Greene County.

It is well settled that in actions of this kind this Court can review the evidence and determine questions of fact as well as of law, but there is a presumption that the proceedings in the court below are correct and the appellant must show error. *Howard v. Board of Education,* 189 N. C., p. 675; *Power Co. v. Moses,* 191 N. C., p. 744; *Board of Comrs. v. State Highway Commission, ante,* 26. To effectuate the legislative intent, statutes relating to the adoption of a county-wide plan are liberally construed and was so done in *Causey v. Guilford County,* 192 N. C., 298.

The findings of fact by the court below was to the effect that on 27 May, 1927, the board of education of Greene County, by unanimous resolution, consolidated the two school districts, in accordance with the county-wide plan. Notice was duly given. It was done by the board of education in good faith, and in the honest exercise of its discretion. *Gaddis v. Cherokee County Road Com., post,* 107. There was evidence to sustain the findings.

It may not be amiss to add that the record discloses a map indicating the plan for the reorganization of the Greene County School System where the high school, elementary and primary schools were to be located and the old schools all shown. Full particulars given. A call by the board of education of all the white school committee and to all other citizens and friends of education who are interested to meet 11 May, 1925, at 10 o'clock a.m., in the courthouse at Snow Hill. The letter sent to the committee and published with the map, states in part: "A plan has been worked out for a county-wide consolidation of schools, and Dr. George Howard, Jr. (director of school organization), from the State Department of Education will be here that day and speak and explain this plan to the people. This is the most important question that the committeemen of Greene County have ever been called together to consider. Under the present law no schools can be consolidated till a plan is adopted. So arrange to be here and learn exactly for yourself how this plan is. See that all the committeemen in your district are


Plan for the
ORGANIZATION OF THE SCHOOLS OF
GREENE COUNTY N.C.
Submitted by
George Howard Jr.
Director of School Organization
Walstonburg
Jonas Williams
Bynums
Corbetts
Castoria
Lanes
Willow Green
Lizzie
Beamons
Harpers
Maury
BullHead
White Oak
Ormondsville
SnowHill
Jerusalem
Union Chapel
Cowards
Shine
Taylors
Suggs
Hookerton
Mewberns
Arba
Borrow
Jason
Glenfield
Hookers
High Schools
Elementary
Primary Schools
Present Schools
For Elementary Sch.
For High Schools

present. Bring some other citizens along. Come with an open mind and have at heart the future welfare of the children of your community and Greene County."

The map, with full detail information of the purpose of the meeting was published in *The Standard-Laconic,* a newspaper published in the county of Greene, and the most widely read paper published in the county. Then again, notice of the call states: *"You are urged to study the above map and come to Snow Hill next Monday prepared to discuss the matter with one purpose only in view, that of bettering the school advantages for the children of our county."*

From the record we can see no reason for disturbing the findings of fact or conclusions of law by the court below. The judgment is

Affirmed.

CALDWELL COUNTY v. R. A. DOUGHTON ET AL.

(Filed 31 January, 1928.)

1. Taxation—Levy and Assessment—Review, Correction, or Setting Aside Assessment.

The right of a dissatisfied taxpayer on lands to have the value of his property reduced for the purposes of taxation in proceedings before the State Board of Assessments by original proceedings, under the statute of 1925, was superseded by the statute of 1927, requiring certain proceedings before the board of county commissioners to originally be had, and when the question involved is solely as to whether such value theretofore fixed and agreed upon be reduced, original proceedings before the State Board will be disregarded and considered as a nullity.

2. Statutes—Construction—In Particular Classes of Statutes.

An amendment to a statute by the Legislature may in proper instances be regarded as an interpretation of a former act and considered by the courts as persuasive authority.

APPEAL by plaintiff from *Schenck, J.,* at August Term, 1927, of CALDWELL. Reversed.

The defendants are the State Board of Assessment, hereafter designated Board of Assessment, the individual members thereof, and A. L. Watts. They were notified that the plaintiff would apply to the Superior Court for a writ of *certiorari* to view an order of the defendant board in accordance with a petition or complaint containing in substance the following allegations: (1) On 25 October, 1919, the Watts Cotton Mill Company, hereafter designated Watts Company, listed its real property in Caldwell County at $250,000; and on the first Monday in April, 1923,

the board of commissioners, pursuant to the Public Laws 1923, ch. 12, sec. 124, determined by resolution that the taxable property of the county had been assessed at its true value in money, that a reassessment was unnecessary, and that real property in the county should be entered upon the tax books for the next quadrennial period at the value which had previously been assessed. (2) On 18 June, 1923, the Watts Company, having sold a part of its land, listed the remainder for taxation at $213,016; and on 3 April, 1926, it conveyed to A. L. Watts all its land in Caldwell County except about 30 acres, thereby reducing the quantity in the county to 595 acres, which on 2 July, 1926, was listed by Watts at $171,991. (3) Neither the Watts Company nor Watts in 1919, or 1923, or at any other time prior to 1927, made any complaint to the county board of equalization or other officers in regard to this valuation, but in April, 1927, Watts did request of the chairman of the board of commissioners a reduction, which was refused at a regular meeting of the board. (4) Watts thereafter filed with the Board of Assessment a petition for a reduction in valuation, and the board made an order that the property be assessed at $100,000, as of 1 May, 1926, for the purpose of taxation for the year 1926. (5) The defendant Watts is due as taxes for 1926 the sum of $2,710.12.

The summonses were issued 19 August, 1927, and were duly served with a copy of the complaint and the notice. At the hearing Watts paid the taxes admitted to be due upon the valuation fixed by the Board of Assessment and the record of the board was made a part of the record in the cause.

The defendant board and the defendant Watts filed separate demurrers for defect and misjoinder of parties defendant; for failure to state a cause of action in that it is sought to review the order of the Board of Assessment in a direct proceeding against it, whereas the remedy, if any, is by appeal or *certiorari;* and in that the only alleged cause of action is a want of jurisdiction on the part of the Board of Assessment to hear and determine the matters in controversy. The demurrers were sustained and the plaintiff excepted and appealed.

Squires & Whisnant for plaintiff.

Frank Nash and Walter D. Siler, Assistant Attorneys-General for the Board of Assessors.

W. C. Newland, F. A. Linney and J. H. Burke for A. L. Watts.

ADAMS, J. The plaintiff alleges, and by demurring the defendants admit, that on 25 October, 1919, the Watts Company listed its real property in Caldwell County at an accepted valuation of $250,000; that on the first Monday in April, 1923, the board of commissioners,

pursuant to the Public Laws of 1923, ch. 12, sec. 124, determined by resolution that taxable property in the county had been assessed at its true value in money; and that real property therein should be entered on the tax books for the next quadrennial period at the value previously assessed; also that on 18 June, 1923, the Watts Company, having sold a part of its land listed the remainder at an accepted valuation of $213,016. The mill was sold to A. L. Watts on 3 April, 1926, and on 2 July, 1926, the land, then reduced to 595 acres, was listed for taxation at $171,991, a sum approved by the county authorities as a proper basis for the assessment of taxes.

In 1923 the land owned by the Watts Company was given an assessed value for the next four years. Public Laws 1923, ch. 12, secs. 114, 120. The board of county commissioners constituted the board of equalization in each county (sec. 18) or the board of equalization and review (sec. 122); but it was provided in section 18 that the board should not increase or diminish the assessed value of any lands, except in the year in which the lands were valued for taxation, unless such valuation were affected by extraordinary circumstances, the facts in connection with which were to be found by the board. Whether the difference between $213,016, the assessed value of the land on 18 June, 1923, and $171,991, the assessed value on 2 July, 1926, was a diminished valuation or an apportionment of the assessed value among the Watts Company and the purchasers of parts of the land, we need not inquire; for the property in question was listed after the sales at a valuation which was acceptable to the plaintiff.

In addition to the sections heretofore cited from the act of 1923, the Machinery Act of 1925 contains a provision for specific complaints in reference to the valuation of land. The board of county commissioners is authorized to hear and determine specific complaints of overvaluation or undervaluation of any particular tract of real property after the general equalization order has been made—the aggrieved party to file with the clerk of the board sometime in May or June of the current year an application in the prescribed form. Public Laws 1925, ch. 102, sec. 109.

The act of 1927, continues all the foregoing sections and provides that the application for relief shall be heard not later than 15 July, and that any property owner may except to the order of the board of county commissioners and appeal therefrom to the Board of Assessment by filing written notice of such appeal and the grounds therefor with the board of commissioners within ten days after final action and by filing with the Board of Assessment notice of such appeal and a copy of the statement of the grounds therefor within ten days after filing such notice with the board of commissioners. Thereupon the Board of Assess-

ment must fix a time for the hearing and after observing the required formalities may reduce, increase, or confirm the valuation determined by the commissioners.

It is admitted that neither the Watts Company nor A. L. Watts observed any of these statutory requirements at any time. The only semblance of observing them was his conference with the chairman of the board of county commissioners in April, 1927, when the board was not in session; and after the board had made an order declining his application for relief he neither excepted nor appealed.

The first step in the present proceeding was the filing by A. L. Watts of a written application in the office of the Board of Assessment in Raleigh for a reduction in the valuation of the mill property. The application was filed on 25 May, 1927; but before this time the act of 1925, cited in his brief and apparently relied on by the appellee Watts (Public Laws 1925, ch. 102, sec. 5, subsec. 3), had been superseded by the act of 1927. Public Laws 1927, ch. 71, sec. 5, subsec. 3. The latter act went into effect 9 March, 1927. The section on which the appellees base their agreement (act 1925, *supra)* authorized the Board of Assessment: "To receive complaints as to property liable to taxation that has not been assessed or of property that has been fraudulently or improperly assessed through error or otherwise, and to investigate the same, and to take such proceedings and to make such orders as will correct the irregularity complained of, if found to exist. The said board shall constitute a State board of equalization of valuation and taxes. In case it shall be made to appear to the board that any tax list in any county in the State is grossly irregular, unlawfully or unequally assessed, it shall be the duty of the board to correct such irregularities, and to equalize the valuations of property, in a particular county, upon complaint to it of particular taxpayers, or upon its own initiation, under rules and regulations prescribed by it, not inconsistent with this act."

Upon the admitted facts it is manifest that the property was neither fraudulently nor improperly assessed in 1923, and that the first clause of the section is not controlling. The last clause affords relief against "any tax list which has been irregularly, unlawfully, or unequally assessed." The purpose contemplated is revision of the "tax list," whether upon complaint of individual taxpayers or upon the initiative of the board. Whether the section is applicable to the appellee's petition is a matter of grave doubt; but if it is, we are still of opinion that there was error in granting the relief sought. The appellee's petition is addressed to a reduction in value of the mill property as a whole; the plaintiff's complaint is based primarily upon the Board of Assessment's power to reduce the value of the real property owned by the Watts

Company or by Watts individually. Affixed to the complaint is a list of the property returned for taxation: 595 acres valued at $171,991; total value of all real and personal property on 1 May, 1926, $183,116. The order of the Board of Assessment reducing the total valuation to $100,000 necessarily involves reduction in the valuation of the real property—and this reduction, the appellant contends, was not made in compliance with law.

Moreover, in 1927, the General Assembly amended the section we have quoted by adding this proviso: *"Provided,* that no appeal shall be considered or fixed values be changed, unless notice of the same is filed within ninety days after the final values are fixed and determined by the board of commissioners of the county." Public Laws 1927, ch. 71, sec. 5, subsec. 3. This being the only provision in the section for an appeal, it may be regarded as a legislative interpretation that without the proviso the statute contemplated an appeal from the board of commissioners, as essential to the exercise of jurisdiction in matters of this kind by the Board of Assessment; and such legislative construction though not controlling is entitled to respectful consideration. *Sash Co. v. Parker,* 153 N. C., 130; *Kornegay v. Goldsboro,* 180 N. C., 441. This conclusion is fortified by section 110 of the act of 1927 (ch. 71), which in like manner provides for an appeal from the board of county commissioners.

The Watts Company did not contend that its property was overvalued in 1923, or at any other time; and A. L. Watts, who bought the property on 3 April, 1926, made no formal complaint to the board of county commissioners. His informal statement to the chairman was made, not in "May or June of the current year" (Laws 1925, ch. 102, sec. 109), but in the month of April, 1927; and on 12 August, 1927, the Board of Assessment ordered that the revaluation be assessed as of 1 May, 1926.

We understand it not to have been the intention of the General Assembly to confer upon the State Board of Assessment original jurisdiction to hear and determine at all times indiscriminate complaints by individual taxpayers of the overvaluation of their property, but as to controversies similar to this, which arise upon the admitted allegations of the complaint, to confer jurisdiction to review the final orders of the county board of equalization in the manner provided by law. In the case before us this course was not pursued, and as the proceeding before the State Board of Assessment was not authorized by statute it must be dismissed. The judgment of the Superior Court is

Reversed.

F. M. POPE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 31 January, 1928.)

Railroads—Operation—Injuries to Person on Track—Crossings—Negligence—Contributory Negligence—Nonsuit.

When a pedestrian attempts to cross a railroad track on the street of a town without looking, under ordinary circumstances, to ascertain whether a train is approaching, when the view is unobstructed and there is nothing to prevent his thus apprehending the danger in time to avoid injury, or any circumstances from which he may reasonably infer this precaution unnecessary, his own negligence in so acting is the proximate cause of his injury and is a bar to his recovery, though the defendant was negligent in not giving proper warnings of approach; and, upon this uncontradicted evidence, plaintiff's motion as of nonsuit should be allowed.

CLARKSON and CONNOR, J.J., dissent.

CIVIL ACTION, before *Nunn, J.*, at April Term, 1927, of EDGECOMBE.

Nash and Marigold streets in the city of Rocky Mount are much used thoroughfares by pedestrians and vehicles. These two streets constitute one thoroughfare. Nash Street is on the Nash County side and Marigold Street on the Edgecombe County side. The street runs practically east and west. Three tracks of the defendant railroad cross this street at grade. The tracks of the railroad run approximately north and south at the crossing. West Main Street intersects Nash Street west of the railroad track. On 15 August, 1925, the plaintiff, an elderly man, was city cotton weigher. The cotton yard is east of all the tracks of the defendant. On said date, about 10:00 or 11:00 o'clock in the morning, the plaintiff started to the cotton yard along Nash Street, traveling east. According to his testimony he stopped at the corner of Nash and Main streets and looked south towards the depot of defendant, which was approximately 455 feet south of the crossing, and saw a passenger train standing still, headed north or towards the crossing. The plaintiff crossed West Main Street, which is about 35 feet wide, and proceeded along the south side of Nash Street until he reached a point about 8 or 10 feet west of the first track of defendant, crossing said Nash Street. He looked again to his right or south towards the depot and saw this passenger train still standing at the station. He then walked east 8 or 10 feet to the first track, and then turned to his left, walked along side of this track north, with his back to the station, across Nash Street, which is 40 or 50 feet wide. As he was proceeding north crossing Nash Street, he was delayed by two automobiles about a half minute. Upon reaching the north side of Nash Street he then turned east again and crossed the southbound track of defendant and approached the northbound track, and, while on the northbound track, was struck by said passenger train and injured.

His testimony further showed that the train gave no signal by whistle or bell. The engineer of the train testified that he did not blow the whistle for this crossing because there was an ordinance of Rocky Mount in force which prohibited the blowing of the whistle. There was further testimony for the plaintiff to the effect that the train was drifting and was making no noise. The evidence of plaintiff tended to show that the train was going eight or ten miles an hour at the time plaintiff was struck. Plaintiff testified that the track where he was struck was "as straight as an arrow," and that a man standing within eight feet of the track upon which he was injured, could see 200 yards south and to Tar River on the north. There was nothing at the crossing to obstruct the vision. Plaintiff said: "Both engineer and fireman were bound to see if they had been looking—not a stick in the way. . . . The engineer could see me at this time—nothing in the world to keep him from it. There was nothing between me and where I saw that engine but the iron and crossties. There are three tracks at this place."

The issues and answers of the jury thereto were as follows:

1. Was the plaintiff injured by the negligence of the defendant as alleged in the complaint? A. Yes.

2. Did the plaintiff by his own negligence contribute to his injury? A. No.

3. What damage, if any, is the plaintiff entitled to recover of the defendant? A. $5,000.00.

From the judgment on the verdict the defendant appealed, assigning errors.

R. T. Fountain and Geo. M. Fountain for plaintiff.
Spruill & Spruill and Gilliam & Bond for defendant.

BROGDEN, J. The evidence of plaintiff was to the effect that while traveling along Nash Street and arriving at a point 8 or 10 feet west of the first track of defendant railroad, crossing said street, he looked to his right or south a distance of 455 feet, and saw defendant's passenger train headed north, towards the crossing, but standing still. Thereupon he pursued his course eastwardly 8 or 10 feet until he reached the first track of defendant. He then turned to his left northwardly to cross Nash Street, with his back to the train. Two automobiles passed along the street and delayed his journey about a half minute. He reached the north side of Nash Street and then turned again eastwardly, walking across the southbound track, and stepped upon the northbound track, and while walking across said northbound track, was struck by said train. The plaintiff was familiar with the crossing and crossed there every day. He did not look for the train from the time he was

8 or 10 feet west of the first track. He walked to the first track without looking. He then turned northward with his back to the train and walked 40 or 50 feet without looking. He then turned eastward and walked approximately 25 or 30 feet across the southbound track without looking. He then stepped upon the northbound track, without looking, and according to his testimony, never looked at all while traveling a distance of "70 feet or probably a little more." The track at the crossing was as straight as an arrow and there were no obstructions whatever, interfering with the view of the approaching train. The train was running slowly.

The evidence of plaintiff tended to show that the train gave no signal as it approached this important and much used crossing. The defendant, therefore, was guilty of negligence. *Bagwell v. R. R.*, 167 N. C., 611; *Williams v. R. R.*, 187 N. C., 348; *Earwood v. R. R.*, 192 N. C., 27.

The defendant, however, contends that the testimony of plaintiff discloses such a plain disregard of the duty imposed by law upon a pedestrian at a railroad crossing as to bar his recovery. This is the decisive question in the case. There are a multitude of decisions by this Court upon the subject of the duty of a pedestrian in attempting to cross a railroad track. The general rule is thus expressed by *Brown, J.*, in *Coleman v. R. R.*, 153 N. C., 325: "The law imposes the equal duty upon the traveler when he reaches a crossing and before attempting to go on the track to both look and listen for approaching trains, for the traveler, by doing so, if there is nothing in his way, can most certainly prevent a collision and save himself from harm. When he reaches the track, it is no great hardship imposed upon the traveler to require him to exercise ordinary prudence and to cast his eye up and down the track. By so doing he has the last and most certain chance to prevent collisions and to save himself as well as the train, its crew and passengers from possible injury. . . . There are of course exceptions to this, as well as most other rules, but where the traveler 'can see and won't see' he must bear the consequences of his own folly. His negligence under such conditions bars recovery because it is the proximate cause of his injury. He has the last opportunity to avoid injury and fails to take advantage of it." The opinion proceeds further: "When must a traveler look? A writer in the Personal Injury Law Journal of July, 1910, declares that all conflicts of opinion on this subject may be avoided by adopting the common-sense rule that the traveler should look when about to enter upon the track."

Again, in *Davidson v. R. R.*, 171 N. C., 636, the law is thus declared: "It is well settled that where a pedestrian, in the *daytime*, steps upon a railroad track, the view of which is unobstructed, and is injured thereby,

and has not looked or listened, his own negligence is the proximate cause of the injury, and such negligence will preclude his recovery."

In *Holton v. R. R.*, 188 N. C., 277, *Hoke, J.*, declares the law to be: "It is the recognized duty of a person on or approaching a railroad crossing to 'look and listen in both directions for approaching trains if not prevented from doing so by the fault of the railroad company or other circumstances clearing him from blame,' and where, as to persons other than employees of the company, there has been a breach of this duty clearly concurring as a proximate cause of the injury, recovery therefor is barred."

All the evidence in the case discloses that there were no obstructions at the crossing, and that plaintiff was not prevented from looking "by the fault of the railroad company."

Now, what are, under the decisions, "other circumstances clearing him from blame?" These may be classified as follows:

1. Where the view of the traveler is obstructed by boxcars, engines, trees, bushes, crops or other obstructions which would render looking ineffective. *Norton v. R. R.*, 122 N. C., 910; *Penninger v. R. R.*, 170 N. C., 473; *Perry v. R. R.*, 180 N. C., 290; *Rigsbee v. R. R.*, 190 N. C., 231.

2. Where gates, flagmen or watchmen are maintained at a crossing a traveler is not negligent, as a matter of law, when the gates are open if he entered upon the track without looking or listening. *Russell v. R. R.*, 118 N. C., 1098; *McLellan v. R. R.*, 155 N. C., 1.

3. In cases of sudden peril, imminent danger and emergency not brought about by the negligence of the traveler. *McLellan v. R. R.*, 155 N. C., 1; *Hinton v. R. R.*, 172 N. C., 587; *Odom v. R. R.*, 193 N. C., 442.

4. The existence of unusual and extraordinary conditions created by the railroad company, which tend to distract and divert the attention of a man of ordinary prudence and self-possession from the duty of looking and listening effectively for an approaching train. *Farris v. R. R.*, 151 N. C., 484; *Plyler v. R. R.*, 185 N. C., 357; *Chisholm v. R. R.*, 114 S. E., 500.

None of these exceptions apply in this case, and therefore the general rule, as announced by the Court in many decisions in which recovery has been denied, must be given full force and effect.

The plaintiff relies upon *Franklin v. R. R.*, 192 N. C., 717. The *Franklin case* marks the utmost boundary of a tendency to relax the common-sense rule of prudence, which is so intimately woven into our law. In that case a lever car had just passed the crossing in question, headed in the opposite direction. The plaintiff saw the car standing still at the station. He then walked rapidly 25 or 30 yards to the

crossing, and this same car, having been reversed, was traveling backwards over the identical crossing which it had passed an instant before, headed in the opposite direction. Certainly this was an unusual movement of the car.

In the case at bar plaintiff knew that this was a regular passenger train, headed in his direction. He crossed at this crossing every morning, as his place of business was on the east side of the tracks, and therefore must have been advertent to the usual operation of the passenger trains. The plaintiff said: "On the morning of the accident I was hurrying to get to my business, walking along right peart. My mind was on my cotton and I was looking across to see if they had weighed up any." A casual glance of the eye before stepping upon the northbound track, would doubtless have averted the unfortunate injury which the plaintiff has suffered, but what is written in the law is written, and it is the duty of the Court to apply it. Therefore, we hold that the motion for nonsuit should have been allowed.

Reversed.

CLARKSON and CONNOR, J.J., dissent.

ANDY MONTEITH AND ANDY BRYSON, TOGETHER WITH ALL OTHER CITIZENS WHO WISH TO MAKE THEMSELVES PARTIES TO THIS ACTION, IN JACKSON COUNTY, v. THE BOARD OF COUNTY COMMISSIONERS OF JACKSON COUNTY, COMPOSED OF S. C. COGDILL, THOMAS BARRETT, AND S. M. PARKER.

(Filed 31 January, 1928.)

1. Statutes—Repeal and Revival—"Elections."

When a statute, local to a county, as to the holding of an election upon the question of the stock law in any well defined portion thereof, particularly prescribes the method and machinery by which the election shall be held, a general statute requiring the Australian ballot to be used does not repeal the provisions of the local statute unless by express words or necessary implication.

2. Elections—Description of Territory—"Stock Law."

Under the facts of this case: *Held*, there was sufficient evidence that the definition of the territory voting for the stock law in a certain section of Jackson County was sufficiently certain under the requirements of a public-local law relating to that county, and that the description was sufficiently definite.

APPEAL by defendant from *Sink, Special Judge,* at June Special Term, 1927, of JACKSON. Reversed.

The facts will be set forth in the opinion.

Bryson & Bryson and W. R. Sherrill for plaintiffs.
Sutton & Stillwell and Alley & Alley for defendants.

CLARKSON, J. This is an injunctive proceeding, brought by plaintiffs against defendant, board of commissioners for the county of Jackson, to restrain and enjoin it from declaring the result of a stock law election held 3 May, 1927. A restraining order was issued and the proceeding was continued from time to time and heard at June Special Term, 1927, of Jackson Superior Court. The court below continued the restraining order, or injunction, in force until the final hearing of the proceeding, on the ground that the election "was not held as by law provided." The defendant excepted, assigned error and appealed to the Supreme Court.

The parties agreed to the following statement of case on appeal: "The General Assembly at the Extra Session of 1913 (Public-Local Laws, ch. 69), passed a special stock law act for Jackson County, therein providing the machinery under which elections thereunder should be held. The General Assembly of 1927 (Public-Local Laws, ch. 411) passed an act, providing that territories less than the county, or less than a township, might organize and vote for the establishment of a stock law within such boundary, and the defendant contended on the hearing that the stock law election in question was held under and by virtue of the provisions of the two above-mentioned statutes, and the plaintiffs, on the other hand, contended that the Australian Ballot Law, which was enacted for Jackson County at the 1921 session of the General Assembly was exclusive, and that any election attempted to be held under the two statutes first above mentioned was a nullity and void. And that the boundary was not a well described and defined boundary as set out in the notice."

No complaint was filed. The court below found no facts. The cause was heard on conflicting affidavits submitted by both sides to the controversy.

Public-Local Laws of 1927, ch. 411, is as follows: "Section 1. That chapter sixty-nine of the Public-Local Laws of Extra Session of one thousand nine hundred and thirteen, and chapter four hundred and eight of the Public-Local Laws of one thousand nine hundred and seventeen of the General Assembly be and the same is hereby amended by adding thereto the following: That any well defined and described portion of any township in Jackson County which has not heretofore come

under the benefits of said chapters, may at any time, upon petition of the majority of the qualified voters therein to the commissioners of Jackson County, hold an election under and as provided in said chapter, and upon the filing of a petition from any well defined part or portion of any township, it shall be the duty of the board of commissioners of said county to canvass the same, and if they shall find that a majority of the qualified voters therein have signed such petition, then it shall be their duty to order an election as is provided in said chapters for townships; and if at such an election a majority of the qualified voters in such well defined portion or part of any township shall vote for 'exclusive stock law,' then the same shall be reported to the commissioners as in said chapter sixty-nine and four hundred and eight are provided, and such portion or part of any township shall have the full rights and benefits of the exclusive stock law as provided for in chapter sixty-nine and four hundred and eight. Sec. 2. That all laws and clauses of laws in conflict with this act are hereby repealed."

Public-Local Laws of 1913, ch. 69, provides the machinery under which exclusive stock law elections can be held for "the whole of such township as its boundaries may then be constituted." Public-Local Laws of 1917, ch. 408, made certain amendments to the above law of 1913. Public-Local Law of 1927, amends both of the above laws and authorizes the exclusive stock law elections to apply *"to any well defined and described portions of any township in Jackson County."* This act in clear language says: "Hold an election under and *as provided in said chapters."* In unmistakable words says: *"That all laws and clauses of law in conflict with this act are hereby repealed."*

The plaintiffs contend that the question involved is: "Does the Australian Ballot Law apply in Jackson County and repeal the Public-Local Laws of 1913?" We think not. The acts, etc., in relation to the Australian Ballot Law is as follows:

Public-Local Laws 1917, ch. 606, "An act to provide the Australian Ballot" was made applicable to Buncombe, Henderson and Madison counties. Public-Local Laws 1921, ch. 269, makes the above Australian Ballot Act applicable to Jackson County, "and that all elections held in said county after ratification of this act shall be held under the provisions of the laws herein specified. Sec. 2. That all laws and clauses of laws in conflict with this act are hereby repealed."

The repealing clause language above in the Jackson County Act is the same as in the 1917 law applicable to Buncombe, Henderson and Madison counties.

Section 5928 of the Consolidated Statutes of 1919 reads as follows: "The county board of elections in each county shall appoint all registrars and judges of election in their respective counties and fill vacan-

cies except as herein provided." That section 1 of chapter 606, Public-Local Laws of 1917, which was made applicable to Jackson County by chapter 269 of the Public-Local Laws of 1921, reads as follows: "All ballots cast in any election in this State, general, special, or primary, or in any vote upon a constitutional amendment, or questions submitted to the people, whether it be a State, district, county, township, or municipal election or vote, shall be prepared, printed and distributed in the manner hereinafter set forth and in no other." That secs. 3, 4, 5, 6, 7, 8, and 9, of the Public-Local Laws of 1917, applicable to Jackson County requires the ballots used at said election to be dated and signed by the chairman of the county board of elections of Jackson County, which in the case at bar was not done. The county board of elections of Jackson County had no meeting, made no order, nor did anything else whatsoever in connection with the appointments of registrar and judges, advertising the election, furnishing the booths, authorizing the printing and distribution of ballots or sample ballots, nor did any other thing with reference to said election. No demand was made upon the board of elections of Jackson County to call an election as set forth by the statutes cited. That section 12 of the Public-Local Laws of 1917, chapter 606, reads as follows: "That if any question or proposition shall be submitted to the people of any township, district or other political subdivision, a ballot shall be used conforming as nearly as possible to the rules prescribed for the official ballot on constitutional amendments. The county board shall prescribe the rules therefor, if it be a question submitted to a township or subdivision within the county, and the State Board of Elections, if it be a question submitted to a subdivision covering all or more than a county." That section 17 of the Public-Local Laws of 1917, ch. 606, made applicable to Jackson County by chapter 269 of the Public-Local Laws of 1921, reads in part as follows: "The county board of elections in each county shall be charged with the duty of preparing, printing and distributing all ballots for general, special and primary elections and all ballots for constitutional amendments or propositions submitted, except ballots for city or town election or votes, etc. . . . (Sec. 43(a) *Provided,* the provisions of this act shall not apply to any public graded high school, or other school election, but that the present laws providing for such elections shall remain in full force and effect." We give full extracts from the general statutes which plaintiffs contend that the exclusive stock law election should have been held under, but we think, beyond question, the special acts, *supra,* applicable.

The principle is well settled in 36 Cyc., 1092(2), as follows: "When the provisions of a general law, applicable to the entire State, are repugnant to the provisions of a previously enacted special law, applicable to

a particular locality only, the passage of such general law does not operate to modify or repeal the special law, either in whole or in part, unless such modification or repeal is provided for by express words, or arise by necessary implication." *Felmet v. Comrs.,* 186 N. C., 251, and cases cited.

The Public-Local Laws of 1927, ch. 411, quoted, *supra,* the last expression of the General Assembly on the subject, specifically requires the election to be held under and as provided by Public-Local Laws, Extra Session, 1913, ch. 69, etc., and that all laws and clauses of laws in conflict with that act are repealed.

The next question involved: Were the boundaries of the Hamburg Township Stock Law election sufficiently defined and described and proper notice thereof given as by law required? We so hold. As previously stated, the court below found no facts. B. Norton, in his affidavit, states that he is 71 years old, a resident of Hamburg Township since his birth, a freeholder living in the exclusive stock law territory in controversy; that he is a civil engineer, familiar with the lines, has good knowledge of the property lines, and, as well as natural boundaries, and testified, in substance, that the boundaries were sufficiently defined and described.

To the same effect was the affidavit of H. C. Moss, "well known to all the people of said township."

The statute says, "any well defined and described portion of any township in Jackson County." We have read carefully the description set out in the record of the exclusive stock law territory in controversy. It appears to be well defined and described, and if not in its entirety certain, can be readily made certain. *Id certum est quod certum reddi potest. Newson v. Earnheart,* 86 N. C., p. 391.

We think proper notices were substantially given of the boundaries as required by law. No one could be misled by the notice, and there is no evidence to that effect. We think the special acts applicable were in all respects substantially complied with.

It is not disputed that in the election held 3 May, 1927, in the exclusive stock law territory in controversy, 126 qualified voters voted for "Exclusive Stock Law" and 16 voted "No Stock Law."

"The ultimate conclusions from the authorities is thus stated in 10 A. & E. Enc. (2 ed.), at pp. 755, 767: The general principles to be drawn from the authorities are, that honest mistakes or mere omissions on the part of the election officers, or irregularities in directory matters, even though gross, if not fraudulent, will not avoid an election, unless they affect the result, or at least render it uncertain. But if the irregularities are so great that the election is not conducted in accordance with law, either in form or substance, and there are matters of sub-

stance that render the result uncertain, or where they are fraudulent and the result is made doubtful thereby, the returns should be set aside." *Hill v. Skinner,* 169 N. C., at p. 412. See *Plott v. Comrs.,* 187 N. C., p. 125; *Flake v. Comrs.,* 192 N. C., 590.

From the entire record we do not think a prima facie case has been shown to entitle plaintiffs to injunctive relief. *Plott v. Comrs., supra; Wentz v. Land Co.,* 193 N. C., p. 32. It may not be amiss to state that plaintiffs in their brief only referred to the statutes quoted, but cited no authorities to support their contention.

For the reasons given the restraining order, or injunction, is dissolved. Reversed.

IN RE WILL OF JOHN S. EFIRD, W. T. EFIRD, CAVEATOR, v. R. L. SMITH ET AL., PROPOUNDERS.

(Filed 31 January, 1928.)

1. Appeal and Error—Review—Scope and Extent in General.

Where the caveat to a will is duly filed and the trial regularly had upon the sole theory that the testator did not have mental capacity to make it, on appeal the caveator may not successfully contend that it was invalid for undue influence brought to bear upon the testator, and that therefore it was not in fact his will, but that of another.

2. Evidence—Materiality—Sufficiency to Raise Issue — Issue — Wills — Undue Influence—Evidence Thereof.

When there is evidence upon the trial of a caveat to a will tending to show that the testator was a man of good mind and judgment at the time of the making of the will in question, that for some time theretofore he had given much care and study to the disposition of his property and that the paper-writing admitted to probate in common form was in accordance with his desires frequently expressed to others who were not personally interested therein, and had nothing to expect therefrom; *Held,* further evidence that he had named his attorney as one of several executors therein, who had acted at his request, and had consulted with his wife and had asked her if she were satisfied with the disposition of the estate, is not alone sufficient to raise the issue of undue influence.

3. Wills—Testamentary Capacity—Requisites.

In order to make a valid will the mind and memory of the testator must be sufficient at the time to reasonably understand the extent and nature of the property he is disposing of and its distribution among those who may naturally have a claim upon him and the extent and manner he desires it to be distributed, with the further requirement that the will be in writing and signed by him, or by some person at his request, and also at his request witnessed by two persons in his presence.

4. Appeal and Error—Review—Harmless Error—Wills—Requisites and Validity—Nature and Essentials of Testamentary Dispositions.

While it is only required that the caveator show the absence of one of the essential elements of the testator's mental capacity in order to set aside a will, the failure of the court, in his instructions to the jury, to recognize and instruct particularly as to each under the evidence, will not be held for reversible error, when it appears that the error was purely technical, and the jury, from the evidence and the charge construed as a whole, were not misled thereby, but understood the law applicable to the case.

5. Evidence—Materiality—Sufficiency to Raise Issue—Issue.

While it is the better practice to submit two issues to the jury, when the pleadings and evidence raise them, one on the sufficient mental capacity of the testator and the other upon the question of undue influence, the latter becomes unnecessary when the evidence upon the trial is insufficient to have it considered, and no prejudicial error is committed by the court in relation to the first one.

APPEAL by caveator, W. T. Efird, from *Bowie, Special Judge,* and a jury, at May Term, 1927, of STANLY. No error.

The issue submitted to the jury and the answer thereto was as follows: "Is the paper-writing propounded for probate dated 20 August, 1926, and every part thereof, the last will and testament of John S. Efird? Answer: Yes."

The necessary facts and assignments of error will be set forth in the opinion.

James A. Lockhart for W. T. Efird, caveator.

T. L. Caudle, Brown & Sikes, W. E. Smith and Cansler & Cansler for propounders.

T. C. Guthrie for Mrs. Estelle E. Morrow.

CLARKSON, J. John S. Efird died on 19 January, 1927, leaving surviving him his widow, Bertie E. Efird, and three sons, J. J. Efird, W. G. Efird, and W. T. Efird. W. T. Efird filed a caveat to a paper-writing dated 20 August, 1926, probated in common form—proceeding *in rem*—before the clerk of the Superior Court of Stanly County, as the last will and testament of John S. Efird. *In re Little's Will,* 187 N. C., p. 177. In the paper-writing, R. L. Smith, W. G. Efird, and J. J. Efird are named as executors, and R. L. Smith, Charles A. Cannon and the Wachovia Bank & Trust Company, of Winston-Salem, N. C., trustees, and Mrs. Bertie E. Efird, W. T. Efird, J. J. Efird and W. G. Efird, Mrs. Estelle E. Morrow, and the children of W. T. Efird, and the children of W. G. Efird and the children of J. J. Efird, and the children of Mrs. Estelle E. Morrow are named as devisees, legatees and bene-

ficiaries under said paper-writing. The proceeding was duly transferred by the clerk to the civil issue docket for the trial of the issue of *devisavit vel non.* On the trial the propounders introduced in evidence the paper-writing purporting to be the last will and testament of John S. Efird, with the name of the three witnesses signed to the paper-writing (only two required under law of this State, C. S., 4131). The witnesses testified that the paper-writing was signed, sealed, published and declared by John S. Efird to be his last will and testament in their presence, who, at his request and in his presence and in the presence of each other, subscribed their names as witnesses thereto. They further testified, in substance, that at the time John S. Efird signed the will he had sufficient mind to know the nature, character and value of his property, who his relatives were and those benefiting by his bounty, and the disposition he was making of his property by this will. The propounders rested.

On the part of the caveator, some 18 witnesses were examined. The caveator contends "that the evidence was to the effect that John S. Efird was an old man, in feeble health. That in their opinion he did not have the mental capacity to understand the nature and extent of his property, the natural objects of his bounty and the disposition he was making of it by will. Others testified, that in their opinion, he could understand who his relatives were and their claims upon him, but not the extent of his property and disposition he was making of it. Others, that he understood with reference to his relatives and property, but could not understand the disposition he was making of this property. That Mr. Efird, who owned a large estate, was worried about the disposition of his estate."

THE PAPER-WRITING PROPOUNDED AS A WILL.

It made certain provisions for his wife. The household and kitchen furniture, etc., for her sole use so long as she lives, the residence, house and lot, for her life and at her death to the trustees to be held by them as all other property. The will states that it is in lieu of dower and distributive share as she had considerable estate both real and personal, and had expressed herself as not desiring to take dower and distributive share in the estate. It also provided for her an ample support and maintenance out of the estate according to and suitable to her needs and condition in life, "to provide liberally" and details the manner.

In Item 6, the division is set forth as follows: "It is my will and desire, and I do so direct, that the net income from my estate be divided into five equal parts, and said shall be paid out semiannually by my trustees until the dissolution of this trust as follows, and the

following proportions: One-fifth (1/5) to the children or bodily heirs of my son, W. T. Efird (the caveator in this proceeding) to each share and share alike; provided, however, that said fifth shall be held and invested by my said trustees for the benefit of his said children, and so much thereof used as may be necessary from time to time for their support, maintenance and education; and also, if necessary, certain portions of said one-fifth of my income may be used for the support and maintenance of their parents, as their needs may actually require; and the remainder of said income not so used to be paid out to each of said children respectively, share and share alike, as they become 25 years of age. One-fifth (1/5) to my son, W. G. Efird; provided, however, that he is sober, industrious and law-abiding, but if in the opinion of my trustees he is not such, then the said fifth to be invested by them for the benefit of his children, and so much of it used as may be necessary for their support, maintenance and education; and the remainder of said income not so used to be paid over to each of said children, share and share alike, as they become 25 years of age. One-fifth (1/5) to my son, J. J. Efird; provided, however, that he is sober, industrious and law-abiding, and if in the opinion of my trustees he is not such, then said fifth to be invested by them for the benefit of his children, and so much of it used as may be necessary for their support, maintenance and education; and the remainder of said income not so used to be paid over to each of said children, share and share alike, as they become 25 years of age. One-fifth (1/5) to my adopted daughter, Estelle Efird Morrow, provided, however, that she is economical and shows a disposition to take care of and properly use said income, but if in the opinion of my trustees she is not such, then said fifth to be invested by them for the benefit of the said Estelle Efird Morrow and her children, and so much of it used as may be necessary for her and their support, maintenance and education; and the remainder of said income not so used to be paid over to each of said children, share and share alike, as they become 25 years of age. One-fifth to charity and benevolences (the specific objects to be hereinafter designated by a codicil to be attached hereto)."

Provision is made in case of the death of any child, etc. (Estelle E. Morrow being considered a legal child), before the dissolution of the trust.

"Item 7. On 1 December, 1941, if my wife, Bertie E. Efird, be then dead, said trust shall be dissolved, except as hereinafter provided, but if she be then living said trust shall not be dissolved until her death, but it shall not be dissolved until the happening of both events. On the happening of both events, said trust shall be dissolved and my

trustees shall divide my estate into five equal parts to be paid out and disposed of by them as follows; to wit:

"One-fifth (1/5) to the children or bodily heirs of my son, W. T. Efird (the caveator in this proceeding), who are living at that time, to be divided among them share and share alike. If any of said children shall die before said date and leave bodily issue, then said children of the deceased child shall represent their ancestor and take his or her share; provided, however, that said trustees shall hold and invest said estate for the benefit of said children and pay it to each one as he or she respectively becomes 25 years of age.

"One-fifth (1/5) to my son, W. G. Efird; provided, however, that he is sober, industrious and law-abiding, but if in the opinion of my trustees he is not such, then said fifth shall be paid to his children, share and share alike; provided, however, said trustees shall hold said fund and keep same invested, and use so much of same as is necessary for their support, maintenance and education until each of said children shall respectively reach the age of 25 years.

"One-fifth (1/5) to my son, J. J. Efird; provided, however, that he is sober, industrious and law-abiding, but if in the opinion of my trustees he is not such, then said fifth shall be paid to his children, share and share alike; provided, however, said trustees shall hold said fund and keep same invested and use so much of same as is necessary for their support, maintenance and education until each of said children shall respectively reach the age of 25 years.

"One-fifth (1/5) to my adopted daughter, Estelle Efird Morrow; provided, however, if she should die before the dissolution of this trust, then the same to be paid to her living children, share and share alike, when each of them shall respectively reach the age of 25 years.

"One-fifth (1/5) to charity and benevolences (the specific objects to be hereafter designated by a codicil to be attached hereto)."

Provision is made that certain deeds that have been made for houses and lots, where Estelle E. Morrow, J. J. Efird and W. G. Efird live, shall be kept by the trustees and delivered to them at the dissolution of the trust. They to be charged in the final distribution of the estate ..... sum without interest.

The trustees to pay W. T. Efird (caveator in this proceeding) $1,000 in installments from time to time as in their judgment is best for him according to his needs. All advancements made to any of the children, without interest, to be deducted from their portion in the final division of the estate. The three executors and secretary to the executors, are to receive $1,000 each in full compensation for winding up the estate before they turn over the residue to the trustees. Provision is made giving the trustees power and authority in their discretion to sell any

real and personal property, special care being taken to avoid any speculation, and make profitable investments recommending the investments. The trustees to keep a "clear and concise" record of all transactions, the transactions of the estate and trusts herein created, "which record shall at all times be subject to the free inspection of my heirs and distributees under this will." H. L. Horton, his trusted friend, to keep the record, and on his death, resignation or inability to perform the duties, the trustees to elect a successor. The trustees and secretary shall receive in full compensation for their services three per cent on the gross receipts of all the income derived from the trust fund and three per cent on all disbursements and distributions of said income. The three per cent to be divided equally between the three trustees and secretary. R. L. Smith, W. G. Efird and J. J. Efird are appointed executors, and H. L. Horton, secretary to the executors. R. L. Smith, Chas. A. Cannon and Wachovia Bank & Trust Co., are appointed trustees and H. L. Horton, secretary to the trustees. In case of death, resignation or inability of any of the trustees to discharge the duties of the trust, the resident judge of the Judicial District is designated to appoint a successor or successors.

The evidence: on the part of the propounders, was to the effect that John S. Efird, the testator, had developed high blood pressure and was overweight, which overtaxed his heart. He entered St. Peter's Hospital, Charlotte, 30 April, 1926, and left 20 May. He was put on a diet and his flesh reduced. The will was made 20 August, 1926.

Some forty-nine witnesses testified for the propounders. Those who knew him and saw him at different times mainly during the period of 1926 and up to the time of his death. This evidence was as to his condition before he went to the hospital, at the time he was in the hospital, the time the will was made and until his death. They testified, in substance: That in their opinion, the condition of his mind was normal, at no time any evidence of mental weakness. He had sufficient mind to know the nature, character and value of his property, who his relatives were, the objects of his bounty and what disposition he was making of his property by will. This was the opinion of Dr. Gage, who was his physician when at the hospital and his trained nurse, Lucy Buchanan, who was also of the opinion: "His mental condition was apparently not affected by his physical condition." The opinion of his wife and attorney. Dr. Addison G. Brenizer, whom he consulted professionally and who saw him afterwards, testified: "I wouldn't have thought of his mental condition as being anything but good. It never occurred to me that he was not normal at any time." Dr. W. I. Hill, who has lived in Albemarle 29 years and knew him well, was at stockholders meeting of the Stanly Bank in January, 1927, "day before he

got sick. The apparent condition of his mind at that time was good. . . . In August, 1926, I am of the opinion that Mr. Efird had plenty of ability to block out his will or direct anything that he had that he wanted to do with it." Dr. Brunson, a practicing physician in Albemarle, "The apparent condition of his mind at all times when I treated him was good." Dr. J. C. Hall, his family physician who treated him with Dr. Gage, testified to the same effect as Dr. Gage. Dr. Laton, eye, ear, nose and throat specialist living in Albemarle, known John S. Efird practically all his life, "especially in August, 1926, it is my opinion that Mr. Efird had mind sufficient to know and comprehend the kind, character and value of his property, the natural objects of his bounty, those having claims upon him and how he was disposing of it by will if he was doing it." To the same effect was the testimony of S. H. Hearne, who had known him 40 to 50 years "came in close contact with him." Witnesses who had business dealings with him in all walks of life, testified that during the period in question he was normal, transacted his business matters as he always did and had mental capacity sufficient to make a will. Chas. Smith, a wholesale grocer, testified: "*I considered Mr. Efird had the brightest mind in Stanly County.* . . . I have read part of this will and have heard part of it read. I think he would have understood the clauses and their effect without legal advice; *I think he was fully capable.*"

In regard to one-fifth to charity and benevolence, the objects of which to be designated in a codicil, but was not done, R. L. Smith, testified: "When he spoke of dividing his estate into five parts, he said he wanted one-fifth of his estate to go to charity and benevolences, he said the Lord had been good to him, and he had been successful and he felt like he really owed this amount to the Lord and he wanted it to go for purposes of that kind. Mr. Efird was in a very earnest state of mind at the time."

The setting: At the time of the execution of the paper-writing in controversy, the testator had a wife by a second marriage, Bertie E. Efird, about fifty years of age, three sons (including the caveator) and one adopted daughter, Mrs. Estelle E. Morrow. The caveator being about forty-five years of age and having a wife and ten children, the oldest of whom was married and the youngest, an infant in arms, the other two sons, W. G. and J. J. Efird being considerably younger, each being married and having several children; Mrs. Estelle E. Morrow, an adopted daughter, was about twenty-six years of age, had been married since she was twenty, and had three children. However, she had never been legally adopted. Mrs. Efird, though the second wife of the testator, practically reared the two younger boys and Mrs. Morrow, who was looked upon and treated as one of the children.

It appears from the evidence that while the testator was very fond of all of his sons, and their wives and children, including W. T. Efird, the caveator, and his wife, that he considered that the caveator did not have the ability to properly manage and preserve the share of testator's estate to which he would have been entitled had there been no will. It appears from the paper-writing, in Items 6 and 7, that he provided for the support and maintenance of the caveator and his wife for a long period, and their blood, the children to get support, maintenance and education and the *corpus*. It appears from the evidence, that the chief asset of the estate was the Efird Manufacturing Company, consisting of some five mills, engaged in manufacturing different grades and classes of yarn from both long and short staple cotton. That the testator, after the death of J. W. Cannon, in 1922, became president of the company, and as such, continued to have general management and control of its affairs up to the time of his death. That his second son, W. G. Efird, was vice-president, and this third son, J. J. Efird, was treasurer, and that these young men were intimately associated and connected with their father in the operation and management of the mill, in which the caveator took no part. John S. Efird owned more than half of the voting stock. At the time the will was made, the caveator was running a public swimming pool, that the testator had built and given him.

The property left by John S. Efird, the gross value is estimated to be worth a million, three hundred and fifty thousand dollars, and perhaps more, and his net income was $126,251.00 for the last year of his life.

There were no exceptions taken by caveator to the evidence.

The court below charged the jury: "This is an action brought by one of the legatees, devisees, under the alleged will of J. S. Efird, to test the validity of the will. Under the law any party who is a legatee or devisee or interested in the estate of a party who has made a will, or attempted to make a will, has a right to file what is known in law as a 'caveat' to that will, which simply means an objection to the validity of the will, and in this instance the caveator files the caveat and alleges that this will is invalid because of the fact—he alleges—that the testator did not have sufficient mental capacity to make this will."

This and similar instructions are made the basis of assignments of error by the caveator, on the ground that "these instructions withdrew from the consideration of the jury the question of undue influence." In our opinion, there was no sufficient evidence to be submitted to the jury by the court below that there was any undue influence on the part of anyone.

It is held *In re Craig,* 192 N. C., p. 657: "This Court has intimated in cases of this kind that it is a better practice to submit separate issues

relating to mental capacity and undue influence. *In re Rawlings' Will,* 170 N. C., 58." *In re Herring,* 152 N. C., p. 258; *In re Johnson,* 182 N. C., p. 526.

There was no issue submitted to the jury as to undue influence. The caveator neither requested nor tendered such an issue. Requested no prayer for instruction as to undue influence. The examination of the witnesses on both sides of the controversy was directed to the testamentary capacity of John S. Efird to make a will. The case in the court below was not tried upon the theory that the paper-writing was procured by undue influence, but solely on the question of the testamentary capacity of John S. Efird to make a will.

It is said in *Shipp v. Stage Lines,* 192 N. C., p. 478, "A party is not permitted to try his case in the Superior Court on one theory and then ask the Supreme Court to hear it on another and different theory. *Warren v. Susman,* 168 N. C., 457." *Coble v. Barringer,* 171 N. C., p. 445; *Webb v. Rosemond,* 172 N. C., p. 848; *Cook v. Sink,* 190 N. C., p. 620; *Mfg. Co. v. Hodgins,* 192 N. C., p. 577; *Stone v. Milling Co., ibid.,* p. 585; *Booth v. Hairston,* 193 N. C., p. 278.

In re Hurdle, 190 N. C., p. 224, the principle of undue influence is stated thus: "To constitute 'undue influence,' within the meaning of the law, there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. 'It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made.' In short, undue influence, which justifies the setting aside of a will, is a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. *In re Mueller's Will,* 170 N. C., 28; *Plemmons v. Murphy,* 176 N. C., p. 671; *In re Craven's Will,* 169 N. C., 561. It is close akin to coercion produced by importunity, or by a silent, resistless power, exercised by the strong over the weak, and which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force. To constitute such undue influence it is not necessary that there should exist moral turpitude, but whatever destroys free agency and constrains the person, whose act is brought in judgment, to do what is against his or her will, and what he or she otherwise would not have done, is a fraudulent influence in the eye of the law. *In re Lowe's Will,* 180 N. C., 140; *In re Abee's Will,* 146 N. C., 273." *Marshall v. Flinn,* 49 N. C., 199; *Wright v. Howe,* 52 N. C., 412; *In re Peterson,* 136 N. C., 13; *In re Parker's Will,* 165

N. C., 130; *In re Cross' Will,* 173 N. C., 711; *In re Bradford,* 183 N. C., p. 4; *In re Stephens,* 189 N. C., 267.

It is contended by caveator: "Mr. Efird, aged, infirm and worried, consulted with his wife, and upon her assurance that the document would be satisfactory to her, signed it. At the time of signing it, he had been in consultation with his attorney. He was not able to complete the document, on account of his physical and mental exhaustion. The document, while he was in that condition, was drawn by his regular attorney in such manner as to give this attorney indefinite and almost unlimited control over Mr. Efird's property and his descendants for an indefinite and unlimited length of time. What is, or is not, undue influence, must be determined by the condition of the person upon whom the influence is exercised and the relations between the parties; and where, as in this instance, a man is old, feeble and infirm, and his attorney writes a document giving to that attorney great profit and power, it is for a jury and not a judge to determine to what extent this influence was controlling; the relations between the parties raising a presumption of fact to be rebutted or explained by other evidence."

John S. Efird was in his sixty-ninth year when the paper-writing in controversy was executed, on 20 August, 1926. Bertie E. Efird, his wife, testified: "I heard him say he felt better at times than he had for fifteen years. The condition of his mind during this period was good, and I never heard him make any complaint about his inability to collect his thoughts, about his loss of memory; I never saw any evidence of mental decline. I don't remember the date, whether it was during the latter part of July, 1926, but Mr. Efird had a conversation with me with reference to making a will, and *he got books on making wills.* He did not say that the Wachovia Bank and Trust Company had sent him a copy of Mr. J. W. Cannon's will. *He and I would study and read the books together,* but I did not see Mr. Cannon's will at that time."

R. L. Smith, a practicing attorney in Albemarle since 1897, testified that he was his personal attorney since 1903. The first service was in regard to the administration of his father's estate about 1904. He was constantly off and on in communication with him. "On or about a little before August, 1926, Mr. Efird consulted me with reference to drafting his will. This consultation took place in my office. Mr. Efird phoned for an engagement; said he wanted to see me on a matter of business, and I designated the time when he could come, and he came to my office, I think the first time in the afternoon. That was in August, 1926, either the 18th or 19th, I can't be positive as to which day it was the will was drawn up—the will was signed on the 20th, and it was in process for I know more than one day, perhaps two days." Mr. Smith further testified that John S. Efird stated in detail to him what he wanted put in

his will. He had a tablet and made notes, going thoroughly into the matter as to what he wanted. It was then gone over with Mr. Efird, and he asked that a rough draft be made and to be submitted to him, which was done. The rough draft was produced on the trial of the issue (propounders' exhibit 2), as was also the paper-writing in controversy (propounders' exhibit 1).

Bertie E. Efird, the wife, testified (continued) as follows: "I remember the time he came home and showed me the will he had executed. The paper you show me marked 'Propounders' Exhibit One' looks like the paper Mr. Efird showed me, and it was signed by Mr. Efird, witnessed by those three gentlemen. I think it was on Saturday afternoon between 2 and 3 o'clock that he showed me the will; he had been up town since lunch and came back with it. He handed it to me and said, 'Here is a paper.' I opened it. I knew what it was, because I knew he was having it made, *because he told me he had been to Mr. Smith to write it.* I was lying down when he handed it to me, and opened it and read it, and *he asked me to read it aloud, which I did.* I certainly did read it loud enough for him to hear it and *read it over by sections and paragraphs.* When I got through reading it, Mr. Efird asked me if I was satisfied. I read that part where he made reference to me, and he asked me if I was satisfied, and I answered *that I was satisfied with my part;* I was satisfied with all of it, but I had nothing to do with it. I knew what he was asking about when he asked me if I was satisfied. He told me before that time that I would be cared for and have things as I wanted them. After I told him I was satisfied with it, I handed it back to him, and he handed me the Cannon will, and I read that; that is when I saw it. He did not specially say anything about the Cannon will in connection with his will. The mental condition of my husband at that time was good, and I could not tell any difference in his mental condition with what it had always been. I believe he had mind enough to make a will and know what he was doing. After he made the will he took a trip to the mountains. When I came to this clause in the will with reference to the one-fifth of his estate he set apart for charity and other purposes, he told me he had to designate it later by a codicil; he said perhaps he wanted me to help him study about where to put it—of course he knew where he wanted to put it, but in the way."

A. H. Eller testified that he was trust officer and vice-president of the Wachovia Bank and Trust Company; had known John S. Efird for twenty years. The Wachovia Bank and Trust Company held some stock in the Efird Manufacturing Company, in trust. Mr. Efird was its president. He attended the July, 1926, stockholders' meeting, at which Mr. Efird presided. "After the meeting of the stockholders was concluded I did not attend a meeting of the directors. After the meet-

ing of the stockholders, Mr. Efird shook hands with me, and he walked out of the directors' room or stockholders' room with me, and *introduced the subject of having in mind the preparation of his will at an early date,* and asked me certain things. He said his purpose was to put his estate in trust. He asked me something with reference to the appointment of executors and the appointment of trustees as being the same or different, and something of the usual commissions in the settlement of estates, and said that he wanted the Wachovia Bank and Trust Company as a trustee, without indicating anything about how many trustees he wanted, and said that he might call on me, might want to call on me to advise him further about his will, *and he told me that Mr. R. L. Smith was his lawyer and that he would have him to prepare his will,* and that he wanted to get it done some time quite soon. . . . He said something to me about why he wanted to have trustees appointed; he told me he had the controlling stock; that he had control of the stock of his own mill, and desired to hold the control through the means of trust—the voting power. I can't say he said why he desired to hold the control. He asked me the terms of Mr. J. W. Cannon's will; he said he had been thinking of trusteeing or disposing of his estate something in the manner Mr. Cannon had disposed of his, *and I think he indicated he would like to see a copy of Mr. J. W. Cannon's will.* I said to him, 'I can furnish you with that if you want it, if it will be of service to you; it is a public matter; we have it in our files, and if this will be of service I will send it to you,' and he said very cordially, 'Yes, I would like to have it, like to have you send it to me.' *In consequence I wrote him the following day, sending him a copy of Mr. J. W. Cannon's will.* . . . He asked me about the usual commissions. I said in substance, 'Commissions are either by the testator in his own way in the body of his will or it is controlled by the court under the law.' . . . I told him what Mr. Cannon allowed. I told him he had three trustees, and they were allowed three per cent on receipts and three per cent on disbursements, making six per cent of the income divided equally between three different trustees."

H. L. Horton had been connected with John S. Efird in the mills for about twenty-five years—bookkeeper, office manager, and later general work as secretary. "I had no conversation with Mr. Efird about his will other than *he told me it was being prepared by Mr. Smith, and later he put it out on his desk after it had been signed and said to me 'Horton, I have had it fixed up like I want it.'* A day or two elapsed between the two occasions. After he told me that he put it in the vault in his private drawer. He carried the key to that. After his death I got the key from Mrs. Efird and found its contents; his two sons, Watt (W. G.)

and Jap (J. J.) were with me when I found it. At the time he told me he was having that will prepared, and at the time he told me it had been prepared and signed, I am of the opinion Mr. Efird had sufficient mind and memory to know the nature and character and value of his property, who the natural objects of his bounty were, who had claims upon him, and what disposition he was making of his property by will."

It was in evidence from letters that John S. Efird, from 21 April, 1926, including 13 January, 1927, was purchasing various kinds of bonds and making inquiry through the Wachovia Bank and Trust Company; 21 April, 1926, in regard to purchase of $100,000 State of North Carolina 4½% bonds; 5 August, 1926, purchase $2,000 town of Albemarle 5½% water and sewer bonds; 13 January, 1927 (six days before his death), $25,000 Federal Land Bank 5's; 13 September, 1926, letter to J. P. Cook, chairman board of trustees Stonewall Jackson Training School, Concord, N. C.: "I am in receipt of your letter of the ninth instant, and take pleasure in handing you herewith my check for $1,000, amount of subscription toward the hospital fund. I trust that you will have no difficulty in getting others to subscribe to this fund, *as I consider it one of the most worthy causes in our State, and should appeal to our people who are in position to contribute thereto.* With personal regards, and with best wishes for yourself and the institution you represent, I am," etc.

In the rough draft the executors and secretary were left out, and in the final draft John S. Efird asked R. L. Smith if he would act with his two sons, W. G. and J. J. Efird. In regard to R. L. Smith being appointed trustee, he (Smith) testified: "He then asked me if I would serve as a third trustee, and *I told him I didn't desire to do so, had no desire to do it, but if he wanted me, as a friend, I would comply with his wishes.* He assigned as his reason for wanting me as a trustee that I was on the ground here, and on account of Mrs. Efird taking a lifetime support out of the will, rather than a child's part or dower, that he wanted me put in particularly to see that that provision of the will was amply provided with, or so that she could have some one she could consult with and look after her interest in the matter and call in the other trustees when necessary."

The compensation of the three executors of $1,000 each was reasonable. The three per cent commissions on the income derived from the trust estate and three per cent on the disbursements and distribution of the income to be divided equally between the three trustees and secretary, cannot be considered large. It was not an unnatural request to have his attorney, of long years standing, to act as one of the trustees. The control was not put in the attorney, but in three trustees. The

paper-writing does not give his attorney *indefinite and almost unlimited control* nor an *indefinite and unlimited length of time.* The control is in three and a time limit fixed.

The following cases are cited by caveator: *Amis v. Satterfield,* 40 N. C., 173; *Lee v. Pearce,* 68 N. C., 77; *McRae v. Malloy,* 93 N. C., 154; *In re Worth's Will,* 129 N. C., 223; *In re Everett,* 153 N. C., 83; *In re Fowler,* 159 N. C., at p. 208; *In re Mueller's Will,* 170 N. C., 28; *Brown v. Brown,* 171 N. C., 649; *Plemmons v. Murphey,* 176 N. C., 671; 40 Cyc., 1154 *et seq.* From an examination of these cases we do not consider them applicable to the facts of the present controversy. On the entire record, as heretofore stated, there is no evidence of undue influence sufficient to be submitted to a jury.

The court below charged the jury as follows: "In order that you may understand, gentlemen of the jury, the contentions of the parties and apply the evidence to their contentions, the court will instruct you what in law is understood and meant by 'testamentary capacity.' A man has a right, a person has a right, to make a testamentary disposition of his property by will, gentlemen of the jury, and the law doesn't require the highest degree of intelligence to make a will, and doesn't require that he has to have sufficient mental capacity to make a wise and judicious distribution of his property or disposition, but does require that he have sufficient mind and memory to understand the nature and extent of his property and to form a judgment as to the reasonable value thereof; that he have sufficient mind and memory to know the objects of his bounty—that is, the persons to whom he is seeking to give his property; his near relatives or those who would naturally expect to be recognized or remembered by him in the will. He must also have sufficient mind and memory, gentlemen of the jury, to understand and know what disposition he is making of his property, the manner of the disposition; in other words, he must understand the nature and the effect of the will and the disposition he is making of his property. Now the court charges you, when a man has that amount of mentality that he has the power and the right, under the law, to make a will. There is another requirement however, gentlemen of the jury, that is a statutory requirement. Notwithstanding the fact that he may have this testamentary capacity to make a will, the law requires that the will be in writing, it must be signed by the testator or by someone in his presence and at his request, and must be signed by at least two witnesses who signed it in his presence and at his request as his last will and testament." *In re Craven,* 169 N. C., 561; *In re Ross,* 182 N. C., 477; *In re Fuller,* 189 N. C., 509; *In re Creecy,* 190 N. C., 301, and cases cited. The charge is correct in law and the above authorities fully support it.

The next exceptions and assignments of error are to the charge of the court below, as follows: "So the court charges you in this case, gentlemen of the jury, that the burden of proof in this case is upon the caveator to prove to you by the greater weight of the evidence in this case that Mr. Efird on the twentieth day of August, 1926, did not have sufficient mental capacity to understand the nature and extent of his property and the objects of his bounty and the disposition he was making of it. If he has failed to prove that by the greater weight of the evidence, then it would be your duty to answer this issue 'Yes,' and say it was the will of Mr. Efird because the burden of having to prove this to you and show it to you by the greater weight of the evidence is upon him. Now, gentlemen of the jury, on the other hand, if the caveator to this will had proved to you by the greater weight of the evidence that John S. Efird, on 20 August, 1926, did not have sufficient mind and mentality to know and understand the nature and extent of his property, the objects of his bounty and the disposition that he was making of his property by will, then the court charges you, if the caveator has proven that by the greater weight of the evidence, that it would be your duty to answer the issue 'No.' But the court charges you, gentlemen of the jury, on the other hand, if the caveator has failed to prove to you by the greater weight of the evidence that John S. Efird did not have sufficient mental capacity on 20 August, 1926, to make and execute his will, to understand the nature and extent of his property and the objects of his bounty and those to whom he was giving it, he has failed to so prove to you by the greater weight of the evidence, it would be your duty to answer this issue 'Yes,' because the law presumes he did have such mental capacity and the burden of proof is upon those attacking the will, and unless he has done that by the greater weight of the evidence, it would be your duty to answer this issue 'Yes.'"

Caveator contends: That the above and like instructions were error. The error "consists of the fact that his Honor placed the burden upon the caveator to show that Mr. Efird lacked in all three of the essential elements of testamentary capacity. This error was at no point cured in the charge, for his Honor instructed the jury that these were the elements of testamentary capacity and unless the caveator had established the absence, not of one but of all, they should answer the issue 'Yes.' A number of witnesses had testified that Mr. Efird was lacking in one, while possessing in two, or lacking in two while possessing in one, and the instructions complained of converted these witnesses into witnesses for the propounders. It is true that the law presumes testamentary capacity and a caveator must negative such capacity, but must do so only by negativing one of the elements of such capacity, and where an

alleged testator is lacking in any one of these three elements, the document is not in law a will."

The proposition is clearly stated, but not applicable here. The whole theory of the case, as tried in the court below, disclosed by the record, is to the effect that both caveator and propounders questioned their witnesses on the conjunctive proposition including all the elements as to the testamentary capacity of John S. Efird to make a will. For example, caveator's first witness, James W. Efird, brother of John S. Efird: "I was a stockholder in the Efird mill at that time. As to my brother's mental condition at that time, at the time he came down by the store—I can't tell about that; I said while ago he seemed very much worried. I do not believe that at that time, being so near to his sickness at Charlotte, that he had sufficient mental capacity to know who his relatives and persons having claims on him were, to understand the nature, extent and value of his property and to understand the conditions of this paper-writing and the disposition he was making of his property."

These conjunctive elements were the basis and bed-rock of the contest. The disjunctive attitude of the caveator's witnesses were fragmentary. No prayer for instructions were requested on the fragmentary disjunctive attitude.

The court below charged the theory in accordance with the consistent questions to the witnesses on both sides as to the testamentary capacity including all elements of John S. Efird to make a will. Then again, the fragmentary evidence, on the whole record, on the disjunctive proposition, is weak and vacillating. The fact that in the opinion of one of the caveator's witnesses, "I don't fully understand it myself." For example, again: "I don't think I have sworn he didn't have sense enough to make a will. I said I didn't think he understood the document." Dr. C. M. Lentz, the only physician examined for caveator, who got him to endorse a note in September "talked intelligently about that." . . . "I can't form an opinion as to whether he understood that will or not."

As set forth, the court below, in the beginning of its charge, properly defined testamentary capacity. From this charge the jury could easily understand that the paper-writing was not a valid will if any of the elements of such capacity was lacking.

Construing the charge, as a whole, in the light of the evidence, we cannot hold there was reversible or prejudicial error. Under the facts and circumstances of this case the error was technical, harmless. The jury could not have been misled and it could not have affected the result.

In re Edens, 182 N. C., p. 400, the principle is well stated thus: "The other evidentiary exceptions, or those relating to the Court's

rulings on the questions of proof, are not sufficiently meritorious to warrant a reversal or new trial. Verdicts and judgments are not to be set aside for harmless error, or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling was erroneous, but that it was material and prejudicial, amounting to a denial of some substantial right. *Cotton Mills v. Hosiery Mills,* 181 N. C., 33; *S. v. Smith,* 164 N. C., 475; and *Cauble v. Express Co.,* 182 N. C., 448." *In re Ross,* 182 N. C., 477; *Dickerson v. R. R.,* 190 N. C., 292; *Harvey v. Tull,* 192 N. C., 826; *Power Co. v. Taylor,* 194 N. C., 231. Frequently the courts, under similar situations, have held "and" to mean "or," but the error is technical and harmless on the present record.

We think the last point made by caveator is also untenable. On the entire record, if error, it was harmless and technical. The minor errors that creep into a long trial, if not prejudicial, should be ignored.

For the reasons given, in the judgment of the court below there is No error.

JANE MOSES, GRAYSON MOSES AND WIFE, MAE MOSES; MARVIN SMITH AND WIFE, FLORENCE SMITH; MARY MOSES, WIDOW; BERTHA MOSES, BEN LEE MOSES, R. E. MOSES, JANIE MOSES, ALTIE MOSES AND LYDA MOSES, BY THEIR NEXT FRIEND, BERTIE MAE MOSES, v. TOWN OF MORGANTON, WESTERN CAROLINA POWER COMPANY, AND INTERNATIONAL SHOE COMPANY.

(Filed 31 January, 1928.)

1. Eminent Domain—Compensation—Grounds Therefor—Ponding Waters—Pollution—Nuisance—Private Nuisances—Nature of Injury and Liability.

In condemnation of land for ponding waters, the person whose land is condemned has a right to compensation for the land taken, and when the land so taken is a part of an entire tract, for resulting depreciation to the part not taken, and for special damages resulting from the creation of a nuisance by the pollution of the water ponded, when such is proven, since the condemnation of the land looks to the impounding of water in its natural state, and not to polluted water.

2. Judgment — Conclusiveness of Adjudication — Matters Concluded — Estoppel by Judgment—Res Adjudicatur.

A prior judgment is an estoppel to all subsequent actions as to the issues adjudicated, but not as to issues which might have been included in the prior action, but were not.

3. Same.

In a condemnation of part of a tract of land for ponding waters, when the compensation for the land taken, and the depreciation resulting therefrom to the part of the tract not taken is adjudicated, but the issue of damages resulting from the creation of a nuisance by the pollution of the waters impounded is withdrawn from the jury and the opposing party does not object, the condemnation proceeding does not bar, under the plea of *res adjudicatur*, the right of action on the issue of the private nuisance.

4. Parties—Defendants—Joinder.

When three parties contribute to the causing of a nuisance by impounding polluted waters, one by damming the stream and the other two by polluting the stream above the dam, they are joint *tort-feasors*, and are properly joined as defendants, and the payment by one to the plaintiff, under a prior condemnation proceedings, of consideration for the land taken for that purpose, and for depreciation to the adjoining land not taken resulting therefrom, does not release him from liability for the creation of a nuisance not contemplated in the condemnation proceeding, and therefore does not release the other two on this cause of action.

5. Appeal and Error—Review—Law of Case—Stare Decisis.

A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal.

APPEAL by plaintiffs from *Townsend, Special Judge,* at August Special Term, 1927, of BURKE. Reversed.

L. E. Rudisill and Avery & Patton for plaintiffs.

W. S. O'B. Robinson, Jr., Spainhour & Mull, S. J. Ervin and S. J. Ervin, Jr., for Western Carolina Power Company.

J. D. Williamson, A. Hall Johnston, S. J. Ervin and S. J. Ervin, Jr., for International Shoe Company.

CLARKSON, J. In February, 1925, Western Carolina Power Company, one of the defendants in the present action, completed the erection of a dam on the Catawba River below the premises of the plaintiffs, the dam being a part of a hydro-electric power plant. On or about 14 March, 1925, the Western Carolina Power Company, under and by virtue of the laws of the State, filed a condemnation proceedings against all the plaintiffs, the respondents or defendants in that action, some of them being minors, seeking to condemn thirty-one and one-half acres of the lands of plaintiffs. The action was appealed to this Court. It was held, in part, that under the statute that requires negotiations before condemnation that no attempt need be shown to purchase from minors who are under disability. *Power Co. v. Moses,* 191 N. C., p. 744.

See *Winston-Salem v. Ashby,* 194 N. C., p. 388. The respondents, or defendants in that action, plaintiffs in the present action, set up in their answer:

"Sec. 3. That the tract or parcel of land which petitioner seeks to acquire is a valuable part of the entire tract of land (some 125 acres) belonging to respondents, and is a necessary and indispensable part thereof, and its taking would greatly and irreparably impair the value of the remaining portion of said tract, and if used by petitioner for the purpose of temporarily or permanently impounding water, or if used as a part of a reservoir for ponded water, said use would render the remaining portion of the said entire tract undesirable and valueless to respondents, as respondents verily believe and therefore allege, for that said remaining portion would be wholly cut off and rendered inaccessible to advantageous markets, *and because of the foul and impure nature of the water so impounded would be unfit and unhealthy for human habitation.*"

A hearing was had in said proceeding before commissioners, and from their report the clerk rendered judgment on 4 May, 1925; both parties appealed to the Superior Court of Burke County from the judgment. Said cause was tried on appeal at September Term, 1926, before a jury and verdict in said proceeding was rendered in favor of defendants, respondents, plaintiffs in this action. That at the time of such trial the waters of Hunting Creek and Catawba River had been impounded for a year and were at as high a level as at the time the present action was tried; that in said condemnation proceedings the respondents, defendants therein, and plaintiffs herein, at said September Term, 1926, and before the trial of said proceedings, filed an amendment to their answer, which was allowed by the court, to which no objection was made, as follows: (1) By striking out section 3 in each of the further answers (there were several answers of the individuals of full age and guardian *ad litem* for minors), and inserting in lieu thereof in each of said answers the following words: '3. That the tract or parcel of land which the petitioner seeks to acquire is a valuable part of the entire tract of land belonging to respondents, and is a necessary and indispensable part thereof, and its taking would greatly and irreparably impair the value of the remaining portion of said tract; and if used by petitioner for the purpose of temporarily or permanently impounding water or if used as a part of a reservoir for ponded water said use would render the remaining portion of the said entire tract undesirable and valueless to respondents, as respondents verily believe and therefore allege, for the said remaining portion would be wholly cut off and rendered inaccessible to advantageous markets.' (2) by inserting in the next to the last line in the second section of the prayers in each of the several answers after the

word 'appear' the following words: *'Exclusive of any damages caused by the polluting of the streams adjacent to and bounding the premises of respondents.'* The condemnation suit was tried on the complaint of the Power Company and the answers of the defendants, as amended, and a jury verdict rendered in favor of defendants, respondents, plaintiffs in this action, for $7,500, upon which judgment was rendered, and said judgment and all costs of court were paid by said Power Company and received and accepted by defendants, respondents, therein, who are plaintiffs in this cause. The issue in the cause submitted to the jury was as follows: 'What damages, if any, are the defendants entitled to recover on account of the condemnation by the petitioner of the rights, privileges and easements described in the petition filed in this cause?' That no appeal was taken from such judgment by any of the parties thereto; that on 10 December, 1925, plaintiffs herein, defendant or respondents in the condemnation proceeding, filed this action and it was pending at the time of the trial and disposition of the condemnation suit. The waters of Hunting Creek and Catawba River as now impounded by the erection of the dam across the Catawba River by the Power Company do not cover all of the 31½ acres described in the condemnation proceedings, and such waters do not cover any other portion of plaintiffs' lands.

The present action, brought on 10 December, 1925, above referred to, was instituted against not only the Western Carolina Power Company, but also the town of Morganton and the International Shoe Company, charging that they were joint *tort-feasors* and alleging damage, the Western Carolina Power Company damming up the Catawba River and the other two defendants polluting Hunting Creek that emptied into the Catawba River above the dam, and the dam stopping the excrement and other deleterious substances put in the stream by the town of Morganton and the International Shoe Company, creating a nuisance and damaging plaintiffs' land. The defendant, International Shoe Company, a nonresident defendant, filed petition for removal to the Federal Court. On appeal to this Court the petition was denied. It was said by this Court in the case on appeal, *Moses v. Morganton,* 192 N. C., at p. 106: "In many cases of this kind it has been held to make parties joint *tort-feasors* there must be a common concert of action, design or purpose. In the instant case this may be shown from the result, sequence and consequences of the independent acts. If parties, although acting independently know, or have reasonable ground to believe, that their independent acts combining with the independent acts of others will create a result that will become a nuisance, and they do so causing damage, they become as it were joint wrongdoers *ab initio,* and are liable as joint *tort-feasors.* Where all have knowledge of the independent acts that

create the result and continue the independent acts with knowledge, this *ipso facto* creates a concert of action and makes a common design or purpose. Any other position, from the facts and circumstances of the case, would make plaintiffs practically remediless, although there is a nuisance which all jointly concurred in and contributed to, that is alleged made the plaintiffs' land valueless, and but for such joinder the injury would not have occurred. The term 'nuisance' means literally annoyance—anything which works hurt, inconvenience or damage or which essentially interferes with the enjoyment of life or property. 29 Cyc. L. & P., 1152." *Cook v. Mebane,* 191 N. C., at p. 6; *Masten et al. v. Texas Co. et al.,* 194 N. C., p. 540.

When the present action came on for trial the court below allowed the defendants to file amended answers. The amendment to answer of the town of Morganton and International Shoe Company is as follows: "That prior to the institution of this action, and after said dam was erected, this defendant's codefendant, the Western Carolina Power Company, instituted a suit in the nature of a condemnation proceeding against all the plaintiffs herein, as defendants, and in which suit they prayed for damages, covering all damages sued for herein, which said suit has been prosecuted to judgment and the plaintiffs herein have been fully paid for all damage, past, present and prospective, for the damming up, ponding or backing up of the waters of the Catawba River and Hunting Creek and all injuries and damages incident thereto, and said proceeding and the final judgment in the same, as appears in the office of the clerk of the Superior Court, is expressly pleaded in estoppel and in bar of any recovery by the plaintiffs in this cause."

The amendment to answer of the Western Carolina Power Company, material part, as follows: "And defendant further alleges by way of estoppel and in bar of plaintiffs' cause of action set out in the complaints and of plaintiffs' right to maintain this action against this defendant upon the grounds asserted in the complaint that heretofore and in said action, wherein this defendant was petitioner and the plaintiffs herein were defendants, and wherein judgment was rendered at the September Term, 1926, wherein this defendant sought to condemn 31(½) acres of the real estate described in the complaint, and to secure by such condemnation the easement, rights and privileges of storing, pounding and backing water upon the said 31(½) acres, a portion of said real estate, owned by the plaintiffs herein, by the construction of defendant's dam across the Catawba River; that in said suit the plaintiffs herein as defendants in said action set up and sought to recover therein of this defendant of the value of the land so taken, asserted and set up the depreciation in the value of the remainder of said farm which would be occasioned by the erection and construction of said dam and as one

basis of such damage set up and asserted in said action the same element of damage as is now set up and asserted in the causes of action sued on herein and for which they now ask damages, to wit, the damage caused by the impounding and storage of the waters of Hunting Creek and the deposit of the effluent by the defendant, the International Shoe Company, and their tannery, and the sewage of the town of Morganton; that such matters were matters to be determined in that case."

The Western Carolina Power Company further alleged that the dam had been erected and the water backed and impounded with the pollution, if pollution at all (which was denied), for more than a year before the trial of the condemnation proceeding, "and were essential elements of damages in ascertaining what damages, if any, the said plaintiffs were entitled to recover by reason of the taking of the said lands sought to be taken and condemned therein, and are conclusively presumed to have been taken into consideration by the court and jury in assessing the damages sustained by the plaintiffs herein, who are defendants in said action, or should have been taken into consideration in arriving at and ascertaining said damages, and this defendant therefore sets up, asserts and pleads the said action and proceeding and the judgment and decree rendered therein as an estoppel upon the plaintiff and in bar of the plaintiffs' right to maintain this action against the defendant, or to recover any damages of this defendant by reason of the ponding back of the waters of Hunting Creek upon the lands of the plaintiffs."

The plaintiffs in the present action, by leave of the court, filed replications to defendants', town of Morganton and International Shoe Company, amended answers, denying the facts alleged in that the amended answer "fails to state facts sufficient to constitute a defense," etc.

The plaintiffs, by leave of court, in answer to the material parts of the amended answer of the Western Carolina Power Company, as above set forth, alleged that the condemnation suit referred to, "Was tried and settled by the court and a jury, as admitted . . . upon the question of the value of the easement in the lands of these plaintiffs required for the lawful purposes of the Western Carolina Power Company, as set out in said judgment, and in addition thereto the damage to the remaining portions of the lands of these plaintiffs, caused by the lawful appropriation and use of their property over which such easement was acquired; *that in the estimation of the amount of said value and damage the question of the unlawful use of any part of plaintiffs' said property by the said Power Company and any damages caused thereto or to plaintiffs themselves by the maintenance thereon of a nuisance arising from the damming or ponding of polluted water and the pollution of the same by the joint or several acts of all the defendants herein were withdrawn from the consideration of the jury as being pertinent to the inquiry in*

such condemnation suit or as affecting the amount of damages which they should award to the plaintiffs by their verdict. . . . In the trial of said condemnation suit no evidence was offered or procured by the respondents therein, the present plaintiffs, or by their counsel relating to any pollution of either the Catawba River or Hunting Creek by any of the defendants or the damming up in either of said streams by the said Power Company of foul, polluted or contaminated water, and that neither in the examination of witnesses nor in the addresses of counsel to the court or jury was any mention or reference made to or of any smells, odors, filth or contamination produced on or near the premises of the respondents in said action or of any wrongful or unlawful acts of either of the defendants in this suit producing or tending to produce a nuisance in said stream on or near the premises of these plaintiffs. . . . And plaintiffs, as a further reply to the matters and things attempted to be set up by said amendment, allege *that the only right the defendant, Western Carolina Power Company, acquired under its said easement was and is to pond water of the ordinary kind and character of streams in their natural state,* whereas the water which has been dammed up and backed by the said defendant on the said premises as set out in the complaint is filled with putrid and refuse matter, sewage and other contaminating foreign substances resulting in the actionable and dangerous nuisance on or near the premises of the plaintiffs as set forth in their complaint."

We think the other part of the answer of plaintiffs to the amended answer, which the court below refused to allow plaintiffs to file, not material, but giving the *answer as filed* more specific particulars.

The court below "after hearing the agreement of all parties as to the facts, for the purposes of the pleas of *res judicata* and estoppel, and argument of counsel, announced to counsel that he would hold that the judgment in the condemnation suit was *res judicata* as to the cause of action set up by the plaintiffs against the defendant, Western Carolina Power Company, and that by such judgment the plaintiffs were estopped from setting up their cause of action as alleged against the Western Carolina Power Company, in that they had obtained a judgment in such condemnation suit for all damages incident to the erection and construction of such dam; that the Western Carolina Power Company being a joint *tort-feasor* with the International Shoe Company, and the town of Morganton, and the judgment having been paid, that he would therefore instruct the jury that plaintiff could not recover against either of the three defendants; and thereupon counsel for plaintiffs, in deference to the ruling and intimation of the court, submitted to judgment as of nonsuit and excepted and appealed to the Supreme Court."

In the finding of fact by the court below the condemnation proceeding was *tried out on the theory of damage, "exclusive of any damage caused*

by the polluting of the streams adjacent to and bounding the premises of respondents," plaintiffs in this action.

The question for determination: "Are the plaintiffs herein estopped or their cause of action rendered *res judicata* as against the defendant, Western Carolina Power Company, by the proceedings and the judgment in the condemnation proceeding brought by said defendant as petitioner against the plaintiffs herein, as respondents, tried at the September Term, 1926, of Burke Superior Court? Does the payment of the judgment by the Western Carolina Power Company in said condemnation proceeding release its joint *tort-feasors,* the defendants, town of Morganton and International Shoe Company, from the cause of action set up in the present complaint?" We think not.

The principle of law applicable in regard to condemnation proceedings is stated in *Power Co. v. Hayes,* 193 N. C., at p. 107, as follows: "Authoritative decisions of this and other courts are to the effect that the owner of land, a part of which is taken under the right of eminent domain, may recover as compensation not only the value of the land taken, but also the damages thereby caused, if any, to the remaining land. *R. R. v. Land Co.,* 137 N. C., 330, 68 L. R. A., 333; *United States v. Grizzard,* 219 U. S., 180, 55 L. Ed., 165. In the opinion in the last cited case *Lurton, J.,* says: 'Whenever there has been an actual physical taking of a part of a distinct tract of land, the compensation to be awarded includes not only the market value of that part of the tract appropriated, but the damage to the remainder resulting from that taking, embracing, of course, the injury due to the use to which the part appropriated is to be devoted.' " *R. R. v. Mfg. Co.,* 169 N. C., p. 156.

The principle of damages is laid down thus in 10 R. C. L., part sec. 112: "When a parcel of land is taken by eminent domain, the measure of compensation to be awarded the owner is the price which would be agreed upon at a voluntary sale between an owner willing to sell and a purchaser willing to buy—in other words the test is the fair market value of the land."

The present action against all the defendants is for a tort, an actionable nuisance, causing damage to plaintiffs. By consent this phase of damages could have been tried in the condemnation proceeding, but with leave of court and without objection by the Western Carolina Power Company, it was withdrawn from the jury. See *Langley v. Hosiery Mills,* 194 N. C., 644.

It is said in *Shipp v. Stage Lines,* 192 N. C., p. 478: "A party is not permitted to try his case in the Superior Court on one theory and then ask the Supreme Court to hear it on another and different theory. *Warren v. Susman,* 168 N. C., 457." *Booth v. Hairston,* 193 N. C., at p. 281.

"It is well settled that no damages are contemplated in the original condemnation, except such as *necessarily* arise in the *proper* construc-

tion of the work. Any other rule would be contrary to public policy as well as private right, and could never receive the sanction of the courts." *Mullen v. Canal Co.,* 130 N. C., at p. 503.

In *Towaliga Falls Power Co. v. Sims,* 6 Ga., 749, 65 S. E., at p. 847, it is said: "Indeed, it is never to be presumed that the law intended to authorize the operation of a thing which would seriously endanger the health and lives of its citizens. This is sometimes expressed, somewhat inaptly perhaps, by the statement that the law never authorizes a nuisance. . . . Generally upon the subject of legalizing nuisances, see Wood on Nuisance, ch. 23."

In *Regina v. Bradford Nav. Co.,* 6 B. & S., 631, "it appeared that when the canal was built, and down to within three or four years before the commencement of the action, the water of Bradford beck had been pure, and that the impurity arose from leading into the beck the sewage from the town of Bradford, which, within a few years, had largely increased in population, so that, although the water was impure, no deposit of an offensive kind took place. The water in the canal was stagnant, and there was no current or flow of water, and the sewage was deposited in the canal, so that when boats passed through it, it emitted very offensive smells and gases. The court held that although the company was authorized by Parliament to construct the canal, and feed it with the water from Bradford beck, yet, as at that time the water was clear and pure, it could not be held as having been contemplated by Parliament that the water would become so impure as to make its use in the canal a public nuisance, and the use of the water was enjoined, as well as a use of the canal in any way so as to create a public nuisance by reason of noxious smells emitted from the water used therein." 2 Wood on Nuisances, 3d ed., p. 1047, note 2.

1 Lewis Eminent Domain, sec. 77 (65), p. 81, in part, says: "The general right to the flow of a stream in its natural purity is fully established by the decisions. The upper proprietor may, of course, make a reasonable use of the stream or of his land, though the stream is to some extent polluted thereby. This right to pure water is property, and any interference with the right is a taking, to the extent of such interference. It necessarily follows that a stream may not be polluted for private purposes against the will of the riparian owner, with or without compensation; also that it cannot be polluted for public purposes, except under authority of the law, and upon compensation." *Cook v. Mebane, supra.*

In *Teeter v. Tel. Co.,* 172 N. C., 785, it is said: "It is not denied by defendant that the telegraph line superimposed upon a railroad right of way is an additional burden which entitled the owner to compensation.

Hodges v. Tel. Co., 133 N. C., 225; *Phillips v. Tel. Co.,* 130 N. C., 513." *Rouse v. Kinston,* 188 N. C., at p. 11.

Joyce, Law of Nuisances, latter part section 427 and first part section 428, is as follows: "But where the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. . . . The circumstance that many other property owners residing in the vicinity have also sustained special damages will not make the nuisance any less a private nuisance." *Farmers' Coöp. Mfg. Co. v. R. R.,* 117 N. C., 579, 23 S. E., 43; 29 L. R. A., 700.

"A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal. *Harrington v. Rawls,* 136 N. C., 65." *Strunks v. R. R.,* 188 N. C., at p. 568.

The decision of *Moses v. Morganton, supra,* is the law of the case. The question of nuisance was withdrawn from the consideration of the jury in condemnation proceeding by permission of the court, and without objection on the part of the Western Carolina Power Company. This nuisance element was eliminated and not considered in the verdict rendered in the condemnation proceeding. No compensation has been made for this additional burden. Under the facts and circumstances of this case, the judgment was no estoppel or *res judicata* as to the action for actionable tort for nuisance causing damage to plaintiffs against the Western Carolina Power Company, and it follows no estoppel or *res judicata* as to the other defendants. See *Braswell v. Morrow, post,* 127; *Taylor v. Construction Co., ante,* 30.

In 23 Cyc., at p. 1304 (III), it is said: "The great preponderance of authority sustains the rule that the estoppel of the judgment covers all points which were actually litigated and which actually determined the verdict or finding, whether or not they were technically in issue on the face of the pleadings. But a matter is not in issue in the suit which was neither pleaded nor brought into contest therein, although within the general scope of the litigation, and although it might have determined the judgment if it had been set up and tried." *Hardison v. Everett,* 192 N. C., 371; *R. R. v. Story,* 193 N. C., 362; *Crump v. Love,* 193 N. C., 464.

For the reasons given, the judgment in the court below is

Reversed.

A. O. FERRELL v. J. E. SIEGLE.

(Filed 31 January, 1928.)

1. Libel and Slander—Actionable Per Se.

When the false and defamatory words spoken of and concerning the plaintiff, the subject of his action for slander, are to the effect that he had been stealing and that he should be put in the penitentiary, they are actionable *per se*, not requiring evidence of special damages, and from this publication the law implies malice, and the jury may award compensatory damages.

2. Libel and Slander—Punitive Damages—Requisites for.

In order for the jury to award punitive damages in an action for slander, the utterance of the false words of and concerning the plaintiff must have been with actual malice or ill-will, or uttered under such circumstances as to show a total disregard of the plaintiff's rights in the enjoyment of his reputation.

3. Evidence—Evidence at Former Trial—Admissibility.

In an action for slander, when the alleged words spoken and published are that the plaintiff had stolen certain goods, and should be placed in the penitentiary, the question as to whether it is competent for the plaintiff to introduce the record of the court in a civil action formerly brought by the defendant company to recover the value of the goods defendant had charged the plaintiff with stealing, which resulted in favor of the plaintiff, is not necessary to be determined from the present record.

4. Trials—Issue—Requests for Submission, When Necessary.

Where the defendant in an action for slander desires, under the allegations and evidence, an issue as to punitive damages submitted to the jury, he should aptly tender it, and where only a single issue as to damages is submitted, without his objection, and the amount of the verdict is within that demanded for actual damages, supported by the evidence, it is not reversible error for the trial judge to render his judgment accordingly.

APPEAL by defendant from *Bowie, Special Judge,* and a jury, at July Special Term, 1927, of MECKLENBURG. No error.

This is an actionable action for slander. The material allegations of the complaint of plaintiff are as follows:

"That on or about 1 April, 1926, in the presence and hearing of J. B. Staton, J. B. Edwards, Mr. and Mrs. J. E. Garris, and divers other persons, in place of business of J. B. Staton and other times and places, J. E. Siegle, falsely and maliciously spoke and published of and concerning the plaintiff, A. O. Ferrell, certain false and defamatory words in substance as follows: 'Ferrell has been stealing electricity from the Savona Manufacturing Company, for the past seven years, and he ought to be in the penitentiary.' That the plaintiff is informed and believes, and so alleges, that the defendant wrongfully, falsely and

maliciously spoke and published the said libelous words about the plaintiff for the intent and purpose of injuring him in his good name and standing in the community. That the defendant knew when he spoke and published the said false and defamatory words, charging the plaintiff with an infamous crime that they were absolutely false, and the defendant deliberately, wilfully and maliciously spoke and published the same with the intent and purpose of humiliating and injuring the plaintiff in his character and reputation in the community, and that on account of the said false and defamatory words, the plaintiff has been humiliated, injured and damaged; that on account of the said false utterances charging the plaintiff with the crime of larceny, he has suffered in his good name and fame in the community, and has suffered intense mental anguish which has affected his general health, on account of all of which he has been greatly damaged." Plaintiff prays for $10,000 actual damages and $5,000 punitive damages.

The defendant answers that all the allegations of the complaint are untrue and are denied. The defendant, for a further answer and defense, alleges that he was vice-president and resident manager of the Savona Manufacturing Company. Plaintiff, prior to March, 1926, for about eight years had been overseer in the weave room. For the benefit of the owners of the plant, he took charge. Soon after taking personal charge of affairs of said company, the defendant was informed that the plaintiff in this action had been taking advantage of his connections as an employee of said company, to personally use and convert to his own use, property of said company, material of said company, and the time of hands and labor employed and paid by said company, without making any report thereof to the company or making any compensation or payment to said company for the same, and had destroyed or allowed to be destroyed, manufactured goods of said company, for the purpose of concealing negligent and defective work done by or under the supervision of plaintiff. It became the duty of this defendant to investigate the reports which had been made to him. The plaintiff was operating a store and J. B. Staton was manager of this store of plaintiff. In the course of the investigation in the line of his duty to said company, which had employed him, it became necessary for defendant to investigate the information he had obtained, that the electric current of said store and cafe and home of Ferrell was being wrongfully used from the private lines of the Savona Manufacturing Company, by plaintiff, and not being paid for or being reported to said company, and for said purpose and no other, and in the line of his duty, and in good faith, the defendant made investigation and was informed by the Southern Public Utilities Company, who supplied all electric current used by plaintiff and by Savona Manufacturing Company, that there had never been any meter upon the home of plaintiff,

and that for a long period of time, there had been no meter at plaintiff's store and cafe. . . . All statements were made in good faith for the purpose of inducing plaintiff to have proper meters installed. . . . At no time did the defendant make the statements alleged in the complaint, and such statements as he made were true, and were made in the bona fide belief that they were true, under circumstances which imposed duty upon the defendant, the duty to make them, and the facts and circumstances duly justified this defendant in making all statements which he made with reference to plaintiff. Upon account of the matters above set forth, the statements made by defendant were privileged, said statements were true, and were made without malice, and in bona fide belief in their truthfulness."

The issues submitted to the jury and the answers thereto, were as follows:

"1. Did the defendant in substance speak of and concerning the plaintiff the language as alleged in the complaint? Answer: Yes.

"2. If so, was same false? Answer: Yes.

"3. What damages, if any, is the plaintiff entitled to recover? Answer: $6,750.00."

The necessary facts and assignments of error will be set forth in the opinion.

J. D. McCall for plaintiff.
L. Laurence Jones for defendant.

CLARKSON, J. The evidence introduced by plaintiff sustained fully the allegations of the complaint that the defendant had spoken on several occasions to different persons, and in divers places, that plaintiff, "Ferrell has been stealing electricity from the Savona Manufacturing Company, for the past seven years and he ought to be in the penitentiary." It was also in evidence that defendant had likewise charged plaintiff, in the presence of several persons, of stealing towels, cloth, linen and lumber from the manufacturing company. Defendant charged also that plaintiff stole most of what he owned from the manufacturing company. That in an effort to obtain testimony to the above effect, defendant had tried to bribe a person to swear falsely by attempting to give her $25.00. It was in evidence that he used his position in an attempt to force employees to give false evidence against plaintiff and employees were discharged when they would not testify to the charges made by defendant against plaintiff. That he tried to hire employees to testify to help defendant convict plaintiff.

The plaintiff testified that he ran a cafe which was an aid to the mill and that Mr. Lima, the president of the mill, so considered it and allowed him to use the electricity. He denied that he had ever stolen

anything from the manufacturing company. Plaintiff further testified as to the damage done him by the newspaper publicity, he was blacklisted. He testified to his mental and physical suffering, humiliation, had a nervous breakdown, had considerable of his property which he owed money on swept away, by reason of the slander and loss of position was unable to make payments. He had been working at the mill about 15 or 16 years, for the last 10 years assistant superintendent at a salary of $2,950.00 a year. Had to leave on account of the charges made against him. "He caused me to lose my job." Defendant would not allow the mill employees to patronize his cafe. The plaintiff showed, by numerous witnesses, that his general reputation was good. The defendant introduced no evidence.

The court below charged the jury the law of slander applicable to the facts, in part, as follows: "A defamation made by word of mouth tending to injure or disgrace the person of whom the words are spoken. In order to constitute slander, the words must not only be false but must be malicious—and the maliciousness means, gentlemen of the jury, not always actual malice but the law may imply malice from the words spoken and the court charges you that when the crime of which the plaintiff is charged is an infamous crime, such as larceny, that in law is what is known as words that are actionable *per se,* that is, within themselves; and where a person charges one with the crime of larceny, the court charges you, that is an infamous crime and that those words are actionable *per se* and the court charges you from that the law implies malice, not necessarily ill-will, but it means an act intentionally and wrongfully done by one person to another without just cause or excuse and when those facts exist, the court charges you, you may give compensatory damages to the plaintiff or actual damages. With the proof of actual damage, the law infers malice and malice implies damage, that is, you may give the plaintiff in compensatory damages, you may give him the damage of pecuniary loss, for mental and physical suffering and for humiliation that would naturally follow by one party making this charge against another. But the court further charges you that before you can give punitive damages or vindictive damages, which are sometimes called 'smart money,' that you must find there was actual malice, ill-will between the parties, or, the words and language must be uttered under such circumstances as to show total and utter disregard for the rights of the other party. Under those circumstances the court charges you, you can render punitive damages, that is damages to punish the defendant for his conduct, that is what punitive damages are." *Fields v. Bynum,* 156 N. C., p. 413; *Elmore v. R. R.,* 189 N. C., 658; *Sawyer v. Gilmers, Inc.,* 189 N. C., 7; *Swain v. Oakey,* 190 N. C., 113; *Tripp v. Tobacco Co.,* 193 N. C., 614; *Pentuff v. Park,* 194 N. C., 146.

Numerous exceptions and assignments of error are set forth in the record. Rule of Practice in the Supreme Court, part of sec. 28 (192 N. C., p. 853), is as follows: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him." *In re Fuller,* 189 N. C., 509.

The record of summons, return of notice of appeal to the Superior Court by the justice of the peace, judgment of the Superior Court in case of Savona Manufacturing Company v. A. O. Ferrell, was introduced in evidence by plaintiff. The return shows: "The plaintiff complained through J. E. Siegle, vice-president of the corporation, that the defendant, A. O. Ferrell, was due Savona Manufacturing Company, the sum of $130.00 for electric current used in defendant's dwelling-house and in his cafe. The defendant, in person, denied the indebtedness to Savona Manufacturing Company, the plaintiff, and testified that the current was a gift of the plaintiff corporation. I rendered judgment in favor of Savona Manufacturing Company, plaintiff, against A. O. Ferrell, defendant for $76.00, with interest on $76.00 from 13 April, 1926, until paid, together with $3.60 cost in this action."

The judgment in the Superior Court shows that the verdict of the jury was to the effect "that the defendant was not indebted to plaintiff in any amount." These records were introduced by plaintiff, and defendant, in apt time, excepted and duly assigned error.

"In the jurisdictions where punitive damages are allowed there is a difference of opinion as to the necessity of evidence of actual or express malice to support a finding of such damages, some courts holding that evidence of express malice is necessary; that the injury must result from a wilful wrong or conscious indifference to results. The malice in such cases may be proved directly or indirectly; that is by direct evidence of the evil motive and intent, or by legitimate inference to be drawn from other facts and circumstances in evidence, by evidence of personal ill-will or animosity on the part of the defendant, or may be inferred where the libelous article was recklessly or carelessly published." Newell, Slander and Libel (4 ed.), part sec. 727, p. 816. See *Fields v. Bynum, supra.*

In *Fields v. Bynum, supra,* p. 419, it is said: "His Honor further charged that if the defendant was not actuated by actual malice the plaintiff can recover only compensatory damage. This is a clear and correct statement of the law. Odgers, p. 291; 18 A. & E. Enc., p. 1091, and cases cited; Newell, p. 892."

In *Tripp v. Tobacco Co., supra,* p. 617, it is said: "Punitive, vindictive or exemplary damages, sometimes called smart money, are allowed in cases where the injury is inflicted in a malicious, wanton and reckless

manner. The defendant's conduct must have been actually malicious or wanton, displaying a spirit of mischief towards the plaintiff, or of reckless and criminal indifference to his rights," citing numerous authorities.

The court below charged the jury: "The plaintiff further contends that there was actual malice in this case, says that the defendant was the moving party in prompting this company to sue him for this electricity that they claimed was unlawfully taken and property that they claimed he had unlawfully taken from this company and the plaintiff says he brought this suit to court and failed to sustain it, that the jury found in favor of the plaintiff. Those are circumstances you may take in consideration upon the question of actual malice." The defendant excepted and assigned error to this portion of the charge. The above exception is the only one which defendant, appellant, sets out in his brief and that complies with the rule.

It will be noted that the court below charged the jury that before they could give punitive damages "that you must find there was actual malice," etc. The charge in reference to the record in the civil action, distinctly says: "Those are circumstances you may take in consideration upon the question of *actual malice.*" Under the authorities cited *punitive damages* could not be awarded unless *actual malice* was proved. It was said in *Elmore v. R. R.,* 189 N. C., p. 674: "There was no separate issue as to punitive damages, and on the record there is no way of ascertaining if any of the damages awarded plaintiff were punitive." *Harris v. Singletary,* 193 N. C., p. 589. The plaintiff prayed for $10,000 actual damage and $5,000 punitive damages. The plaintiff was awarded $6,750 damages. The defendant requested no separate issue as to punitive damages.

It is incumbent on defendant, appellant, to show error. The exceedingly interesting discussion by the parties to this action in their briefs as to the competency of the evidence in the civil action and the charge of the court below, it is not necessary to consider on the present record. For the reasons given, there is

No error.

H. T. GADDIS v. CHEROKEE COUNTY ROAD COMMISSION.

(Filed 31 January, 1928.)

1. Mandamus—Nature.

An order of court requiring the board of county road commissioners to carry out the provisions of its resolution to relocate a public road in order to avoid damages to the plaintiff's property is in the nature of a mandamus.

2. Mandamus—Subjects—Public Officers.

Where the board of county road commissioners has passed a resolution ordering a relocation of a public road in order to avoid damaging plaintiff's property, to which he consents the subject-matter is one within the discretion of the board under the provisions of our statute, and therefore is not enforceable as a contract between the parties.

3. Action — Statute of Limitations — When Plea Admissible — Eminent Domain—Compensation—Actions for—When Accrues.

Where the board of county road commissioners runs its road in such close proximity to the plaintiff's house as to be a menace, and thereafter adopts a resolution relocating the road to avoid this damage, and in point of fact this resolution remains in full force though the board has attempted to rescind it, upon the future rescinding of the resolution the plaintiff has an immediate right of action for damages for the taking of his property by condemnation, and the bar of the statute of limitations upon the theory that the claim in the present action should have been made in sixty days from the completion of the road is untenable.

4. Equity—Jurisdiction.

The plea of the statute that the owner of lands make claims for damages of a county road commission for the taking of his property for a highway is not available to the board when its conduct and dealings with the plaintiff has rendered it inequitable.

CIVIL ACTION before *Stack, J.*, at April Term, 1927 of CHEROKEE.

The plaintiff instituted an action against the defendant, alleging that the defendant had entered upon his land and laid out a public road so close to a residence owned by him as to displace the steps and render it dangerous and impracticable to use the house. He further alleged that he made complaint to the defendant from time to time and that relief was promised but that nothing was done until February, 1926, when a committee was appointed to visit the premises and report to the board, and that thereafter at the April meeting, 1926, of said board a resolution was duly passed removing said road thirty feet from plaintiff's house.

The defendant alleged that after the passage of the resolution moving the road thirty feet from plaintiff's house it discovered that such order had been improvidently made for the reason that the cost of construction upon the new location would involve a large expenditure of money by virtue of the uncertain nature of the soil, and thereupon undertook at the July meeting of said board to rescind the order, locating the road thirty feet from plaintiff's house. The cause was submitted to the trial judge who found the facts and embodied them in the judgment which is as follows:

"This cause coming on to be heard before Hon. A. M. Stack, judge presiding and holding the courts of the Twentieth Judicial District,

the same having been heretofore continued by Judge W. F. Harding, there being present and representing the plaintiff, F. O. Christopher and Edmund B. Norvell, his attorneys, and representing the defendant, Messrs. Dillard & Hill, attorneys, the court, upon the pleadings, record and admissions and oral evidence, after hearing the evidence and argument of counsel, finds the following facts:

First: That the defendant, without the consent or authority of the plaintiff, went upon the land of plaintiff and constructed a road so close to plaintiff's house and the front part of same as to render it dangerous to either enter it or come out of said house.

Second: That the plaintiff early in the year 1925, appeared before the defendant and asked that the conditions, to wit, the construction of the road so near his house be changed either by moving the house or moving the road, when the defendant, being in session, exercising the duties imposed upon it by law, agreed to give the plaintiff relief as requested, and from time to time thereafter, when the defendant was sitting as a body continued to agree to grant the request of the plaintiff to move his house or move the road, until at the February, 1926, meeting of said commission (defendant), on motion of D. S. Russell, one of the members of said commission, and its then secretary, appointed two of its members, viz.: W. F. Hill and O. G. Anderson, to go upon the premises of plaintiff and view the conditions existing relative to the plaintiff's house and the road as constructed and make their report and recommendation to the commission (defendant).

Third: That at the April, 1926, meeting of the defendant (Cherokee County Road Commission), all members of said commission, except D. S. Russell, being present, said O. G. Anderson and W. F. Hill, who were appointed a committee to investigate and make report on the condition complained of by the plaintiff, reported and recommended, "that the road be moved thirty feet from Gaddis' house or pay him $100 as damage," when the plaintiff being present accepted the proposition to move the road, when at said meeting the defendant, the Cherokee County Road Commission, being in session (all members being present except D. S. Russell), and performing the duties imposed upon it by law, and having before it and hearing the matter complained of by plaintiff, passed an order in words and figures, as follows:

"It is ordered that said road be changed beginning at or near the drain pipe east of the house of said H. T. Gaddis and run so that the inside or edge of said road next to said house will not be less than thirty feet from said house, and not to cross the branch that runs a west course in front of said house, said change not to be made out of dirt or soil in the bottom in front of or to either end of said house, and said change not to exceed 550 feet in length. Said change to be

made at the expense of Cherokee County Road Commission, and no part of said cost to be borne by H. T. Gaddis."

Fourth: That the plaintiff relied upon the order above set forth in finding of fact No. 3, being carried out in good faith.

Fifth: That at the July, 1926, meeting, the defendant, Cherokee County Road Commission, and without any notice to plaintiff, an effort was made by the defendant to cancel the order made as set forth in finding of fact number three, but same was never canceled and still remains in force and effect.

Sixth: That the defendant (Cherokee County Road Commission), and the plaintiff, at all times sought to avoid litigation and by reason of the promises made to plaintiff by the defendant and the order made by the defendant at its April, 1926, meeting, this plaintiff took no further action in the matter of dispute between him and the defendant, except to resist the cancellation of the order made at the April, 1926, meeting of the said defendant, until he brought this action.

Seventh: That more than sixty days expired between the completion of the road and the adoption of the order at April, 1926, meeting.

Eighth: That the plaintiff is not seeking in this action damages in money, but only that relief be given him as prayed for in his complaint.

Ninth: That the defendant by virtue of its offer to move the road and the acceptance of said offer by the plaintiff, and by virtue of the order made by the defendant at its April, 1926, meeting, desisted from suing for damages to his property within the time limited for bringing such action.

Tenth: That the said defendant (Cherokee County Road Commission), dealt with and agreed with the plaintiff upon the change of the road running in front of his house through his lands, and through its acts and through the acts of its officers, at all times after plaintiff lodged his complaint for the relief, led the plaintiff to believe that it would give him relief, but it has never done so and the conditions complained of still exist.

Eleventh: That the change in the road, as recommended by O. G. Anderson and W. F. Hill in their report made to the defendant at its regular meeting in April, 1926, can be made and said road can be constructed.

Twelfth: That the order made by the road commission at its April meeting, 1926, has not been rescinded or changed; and to do so would be acting in bad faith with the plaintiff and an abuse of official discretion.

It is, therefore considered, ordered and adjudged by the court that the defendant (Cherokee County Road Commission), and its officers do

proceed within ten days from the rising of the court to make the new location and begin to construct the road as ordered to be changed by it at its April, 1926, meeting; and said defendant and the commissioners thereof, are commanded forthwith to comply with this order as commanded above.

It is further considered, ordered and adjudged by the court that the plaintiff do have and recover of the defendant his costs in this action expended.

It is further considered, ordered and adjudged, by the court, that the defendant do pay all costs of this action to be taxed by the clerk."

From judgment so rendered the defendant appealed.

F. O. Christopher and Edmund B. Norvell for plaintiff.
Dillard & Hill for defendant.

BROGDEN, J. The judgment of the court commands the defendant to proceed within ten days to make the change in location of the road in accordance with the resolution of April, 1926. This is equivalent to a mandamus. The plaintiff insists that the resolution of April, 1926, constituted a contract between him and the defendant with respect to the location of the road in controversy. This Court has held that administrative boards, exercising public functions, cannot by contract deprive themselves of the right to exercise the discretion delegated by law, in the performance of public duties, and the courts will not interfere with or supervise the performance of such duties in the absence of fraud, oppression, bad faith or plain abuse of the power vested in such public bodies. In other words, the discretion exercised must actually exist under the law, and even then, it cannot be exercised in a capricious, arbitrary, oppressive and unreasonable manner. *Edwards v. Goldsboro,* 141 N. C., 60; *Johnson v. Comrs.,* 192 N. C., 561; *Carlyle v. Highway Commission,* 193 N. C., 36.

The powers delegated by statute to the defendant are contained in chapter 37, Public-Local Laws, Extra Session, 1924. In section 7 of the act the defendant is authorized to relocate any road in the county in order to make it more useful, "and may order the laying out and construction of new roads." Section 9 of the act empowers the defendant to condemn a right of way for any proposed road "or relocation of any such." This statute does not specify how such location shall be made, neither does it prescribe any formalities to be observed by the defendant in determining locations or relocations, or changes in locations. Hence, it necessarily follows that such matters were committed to the sound and reasonable discretion of the defendant. In such event the law has been tersely stated by *Varser, J.,* in *Board of Education v. Comrs.,*

189 N. C., 650, as follows: "Mandamus only lies to compel action and not to direct it if the asserted powers are discretionary." Again, in *Barnes v. Comrs.*, 135 N. C., 41, *Walker, J.*, discussing the principle of mandamus, said: "While there may be authorities to the contrary elsewhere, the result of judicial decision in this State is that the body clothed with the discretion cannot by any process of the court be compelled to do anything but exercise that discretion—to act in accordance with the law—and while the court may do this, it has no power or jurisdiction to direct the course the exercise of the discretion shall take in order to bring about any given result." Applying these principles, it is apparent that the trial judge was in error, under the circumstances, in making the peremptory order contained in the judgment.

But the plaintiff is not without full and ample remedy. The defendant had full power to adopt the resolution of April, 1926. This resolution was not a contract, but a positive order, changing the location of said road thirty feet from plaintiff's house, in the exercise of discretion committed by law to the defendant. The trial judge finds that said order of April, 1926, has never been canceled and still remains in full force and effect. If so, the road, in contemplation of law, is now located thirty feet from plaintiff's house. If the defendant, in the exercise of its discretion, rescinds the order of April, 1926, and, as it attempted to do, relocates the road at plaintiff's house, where it existed prior to April, 1926, then in such event the plaintiff would immediately have an action for all damages contemplated by law for the taking of his property.

The plaintiff insists, however, that his right of action for damages is barred by section 10 of the act creating the defendant and hereinbefore referred to. Section 10 of said act provides in substance that the party aggrieved "by the taking of such material, or of his land for right of way, may, within sixty days after such road is completed, make application to the board of county commissioners for the assessment of damages and benefits under the provision of the laws relating to state highways." The trial judge finds as a fact "that more than sixty days expired between the completion of the road and the adoption of the order of April, 1926, but the plaintiff's right of action is not barred. The statute provides that the aggrieved party may make application within sixty days after such road is completed, and the judge finds that early in 1925, the plaintiff appeared before the defendant and made complaint, and that the defendant "being in session, exercising the duties imposed upon it by law, agreed to give plaintiff relief as requested, and from time to time thereafter, when the defendant was sitting as a body, continued to agree to grant the request of the plaintiff to move his house or move the road," etc.

Under these facts the defendant cannot plead the statute of limitation in bar of plaintiff's right to recover damages. *Haymore v. Comrs.*, 85 N. C., 268; *Tomlinson v. Bennett,* 145 N. C., 279. In the *Tomlinson case* the law is thus stated: "It is settled that if plaintiff was prevented from bringing his action during the statutory period by such conduct on the part of the defendant as makes it inequitable for him to plead the statute, or by reason of any agreement not to do so, he will not be permitted to defeat plaintiff's action by interposing the plea."

Reversed.

CORNELIA HAYES, GUARDIAN OF WILLIAM MCWHITE HAYES, v. PINE STATE CREAMERY.

(Filed 31 January, 1928.)

1. Master and Servant—Liabilities for Injuries to Third Persons—Scope of Employment.

One employed by the owner of a dairy for the delivery of milk to customers by means of a wagon drawn by a horse, and collecting the empty bottles from the customers, is merely a hired man or a laborer for the performance of a simple and definite task, and when he is informed of an enforced rule of the owner that no one should be permitted by him to ride on the delivery wagon, and in violation thereof he permits a nine-year-old boy to ride thereon and help him in the performance of his duty, without the knowledge of the owner, and without the necessity, and a personal injury is inflicted on the boy by reason thereof, and through negligence: *Held,* it was without the scope of the employment of the driver to allow the boy to ride, and the owner is not responsible for the damages.

2. Same.

The employer may not escape liability for the personal injury of a nine-year-old boy caused by an employed driver of a milk wagon in permitting the boy to ride on the wagon in violation of his rules, previously made known to the driver, when it may reasonably be inferred that the rule had been abrogated by his knowledge of its habitual violation by his drivers.

3. Trials—Questions for Jury.

Held, whether an employer had waived his rule that his employees not permit children to ride on a milk delivery wagon, by knowing that an employee habitually broke the rule is, upon proper evidence, a question for the determination of the jury.

4. Trials—Instructions—Questions for Jury.

An instruction is erroneous which deprives the defendant, in a personal injury case, of the benefit of its rule prohibiting the driver of its milk wagon from allowing children to ride thereon, arising under the evidence

of the case, upon the question of whether the driver was acting within the scope of his employment when the plaintiff was injured by the driver's alleged negligent act.

5. Negligence—Proximate Cause—Evidence.

Evidence of a city ordinance as to the manner of driving a milk wagon upon the street is erroneously admitted upon the trial when its application to the facts of the controversy has not been shown.

CIVIL ACTION, before *Devin, J.*, at May Term, 1927, of WAKE.

The plaintiff is the guardian of William McWhite Hayes, her son, who at the time of his injury was about nine years of age.

The defendant is a corporation engaged in the business of selling and delivering milk and other dairy products to its customers in Raleigh by means of delivery wagons. On 30 December, 1925, the defendant had in its employ a man named Fetner, who was employed for the purpose of driving a horse-drawn delivery wagon for the purpose of delivering milk to the customers of defendant on each morning and taking up any empty milk bottles in the possession of customers belonging to the defendant and returning them to the plant.

The narrative of the injury to William Hayes is as follows: "He (driver) had a one-horse wagon, the usual kind of milk wagon. They kept the milk in bottles and in crates in the wagon. I did some work for him. I do not know how I came to do work for him; sometimes he would have bottles and I would help carry them. What he would not take I would carry and put in the wagon. I would get them from the houses. Sometimes I would ride on the wagon. Mr. Fetner did not say anything to me about doing the work. I asked him if I could ride with him, and he said yes. I do not know how many times I rode with him. I went more than one time, about an hour each day. I think I went with him about a month. Sometimes he would give me milk, and sometimes a nickel. He was delivering milk. He carried it around and put it on people's porches. . . . He would go to one house and I would go to the next. Sometimes we would both be on the same side of the street and sometimes on opposite sides. . . . I left home on the day I got hurt about 8:30 in the morning. I came up with Mr. Fetner at Mr. Privett's store. I did not have an agreement to meet him there. I do not remember what he said that morning. I did not get in the wagon. . . . I went about one block before I began to deliver milk. No one would drive the wagon. The horse would go by himself. The reins would be up in the wagon laying down on empty bottles or crates. No one was driving the wagon at the particular time I got hurt. I had just come from a house with some empty bottles, and when I went to get in I fell. Mr. Fetner was in the wagon. He was doing nothing. He did not have hold of the lines. There is a door to the wagon. There is no

step. There is a platform. . . . The wagon was moving. I do not know whether Mr. Fetner knew that I was there or not. He was in the wagon before I went to the house. He handed milk to me. I got out of the wagon while it was moving. Mr. Fetner did not say anything to me when he handed the milk bottles to me. I had delivered milk there before. When I came back the wagon was moving. I put my foot on the wagon and fell. I fell back toward the wheel. My leg was broken. The wheel ran over my leg. . . . I do not remember that any one else ever rode on the wagon with him and me. No other boys rode on the wagon. I never saw any other boys on it. Mr. Fetner never warned me against getting in the wagon when it was moving. He got in it when it was moving, too. I don't know how fast the wagon was going when I tried to get in. The horse was walking fast. I don't remember how much milk I delivered that morning."

Another witness for plaintiff testified: "I do not recall whether I saw Mr. Fetner allow boys to get on his wagon as he was delivering milk, but I saw boys on the wagon occasionally. I did not see boys assisting him in delivering milk, but I have seen them with others. I had seen boys delivering milk for about one year. . . . From time to time I saw boys riding on the wagon with the driver. They were not all delivering milk to houses in my vicinity. Mr. Fetner had been driving the wagon four or five months before the accident to this boy."

The defendant offered evidence to the effect that it had duly passed a rule instructing all drivers not to allow children or grown persons to be on the wagons except the drivers, and also forbidding drivers to permit children to work in delivering milk or at the plant, and that Mr. Fetner, the driver of the wagon at the time of plaintiff's injury, was duly informed of the adoption of this rule at least two months before the injury happened. The evidence of defendant further tended to show that one man could fully handle the work on that route, and it did not require more than one person to do it, and that no official of the company had received any notice whatever that Fetner or any other driver was employing boys to assist in delivering milk or permitting them to ride on the wagons.

The issues and answers of the jury thereto were as follows:

(1) Was plaintiff's ward injured by the negligence of defendant as alleged? Answer: Yes.

(2) If so, what damages is plaintiff entitled to recover by reason thereof? Answer: $8,500.

From the judgment defendant appealed, assigning errors.

Bart M. Gatlin and W. F. Evans for plaintiff.
Ruark & Fletcher for defendant.

BROGDEN, J. Is the owner of a milk wagon liable for the negligence of the driver thereof, causing injury to a nine-year-old boy, employed by the driver to assist him, or permitted to ride on the wagon or get in and out of it, all in violation of the express rules duly prescribed by the owner?

The judge charged the jury as follows: "So, if upon the testimony you find from the evidence and by its greater weight that on the occasion alleged, 30 December, 1925, the defendant, Pine State Creamery, was engaged in selling and delivering milk from a milk wagon drawn by a horse driven by the defendant's servant, employee and driver, and that the defendant's said driver requested or permitted and used the assistance of the plaintiff, a boy between 9 and 10 years of age in delivering bottles of milk and collecting milk bottles and putting them back in the wagon, and you find from the evidence and by its greater weight that on said date while so engaged and while the plaintiff was attempting to put an empty bottle back in the wagon, and the wagon was in motion, and the plaintiff fell under the wheel of the wagon and was run over and injured, and you find that the defendant's driver was in the wagon at the time and saw, or by the exercise of due care could have seen what the plaintiff was attempting to do and failed by the exercise of due care to avoid it, and you find by the greater weight of the evidence that the defendant's said driver was at the time acting within the scope of his employment and was engaged in doing work in furtherance of defendant's business, and that his acts in relation to these facts were such as were incident to the performance of the duties entrusted to him by the defendant, and you find from the evidence and by its greater weight that the defendant failed to exercise due care with respect to these circumstances to avoid injury to the plaintiff, and that such failure on the defendant's part was the proximate cause of the plaintiff's injury, you will answer the first issue yes, otherwise answer it no."

The driver of the milk wagon was employed for the performance of a simple and definite task. He was merely a hired man or a laborer and no more. The undisputed evidence on behalf of defendant is to the effect that the driver was expressly forbidden, by the rules of the company, to employ boys or to permit them to ride on the wagon. Was the driver then acting within the scope of his employment when he permitted the plaintiff to assist him or to ride upon the wagon? An employer has the right to prescribe reasonable rules and regulations to be observed by his employees for the safe and prudent operation of his business. So long as these rules are in force the employee, certainly, if no more than a hired man or laborer, is not acting within the scope of his employment when he undertakes, in direct violation of such rules, to employ additional help or assistance in the performance of his duties,

unless of course additional help or assistance is such an incident of the duty to be performed as to fairly imply that the employer authorized such employment. Driving a one-horse wagon and placing a bottle of milk upon a customer's porch and returning any empty milk bottle to the wagon is not such a duty as to ordinarily require, as a reasonable or necessary incident thereto, the employment of additional help or assistance.

The principle of law involved is thus expressed by *Hoke, J.*, in *Butner v. Lumber Co.*, 180 N. C., 612: "So far as appears, he had no authority to invite any one into the mill contrary to the rules of the company, nor did he have any right to dispose of these edgings to outsiders, and in such case our decisions are to the effect that liability may not be imputed to the owners and proprietors by reason of his speech or conduct on this occasion, the same being entirely outside of the course and scope of his employment."

But, was the rule of the company forbidding drivers to employ or to permit boys to ride upon the wagon in force at the time of the injury? The test for determining whether or not a rule is in force is thus declared in *Fry v. Utilities Co.*, 183 N. C., 281: "It has been held generally that if a rule is made for the safety of the servant or others, but its customary violation has continued so long that the master either knew of it, or could by the exercise of ordinary care have found it out and acquiesced in it, he is presumed to have consented to its repeal or to have waived obedience to it. . . . If such orders were given, the plaintiff surely was entitled to show that it had been constantly violated for a long time, with the knowledge of the drivers and those in charge of the wagon, from which the jury could well infer that the owner of the wagon had notice of its nonobservance, and that it was an order of the company more honored in the breach than in the observance, and, in legal contemplation, it had been abrogated, or at least waived."

The decisions are to the effect that if the rule has been openly, constantly and habitually violated for such a length of time that the employer in the exercise of ordinary care and diligence should have been apprised and informed of its nonobservance, then the rule is deemed to be waived or abrogated and no longer protects the employer from liability arising from the unauthorized acts of the employee. Whether or not the rule has been thus abrogated or waived is ordinarily a question for the jury.

The decisions from other jurisdictions present a diversity of opinion. Many of the leading authorities upon the subject are assembled in the opinion, concurring opinion and dissenting opinion in the case of *Higbee Co. v. Jackson*, 128 N. E., 61. In that case the Supreme Court of Ohio holds, as stated in the first head-note that "where an employee,

to whom the owner has committed the operation of an auto truck in the owner's business, permits an infant to ride on the truck in violation of his instructions, and the infant is injured by the wanton and wilful conduct of the employee, while in the course and in the scope of his employment, the owner is responsible." The theory upon which the opinion rests is that an infant who climbs upon a truck in violation of the orders or rules of the employer is a trespasser; and, although a trespasser, the employer is liable for the wilful and wanton negligence of his servant, the driver. The dissenting opinion asserts that the act of a driver in inviting a third party to ride upon a truck or wagon in violation of the express orders of the owner is entirely outside the scope of employment of the driver, and therefore imposes no liability upon the owner, citing among other cases *Dover v. Mfg. Co.*, 157 N. C., 324.

The New York Court of Appeals, in the case of *Goldberg v. Borden's Condensed Milk Co.*, 125 N. E., p. 807, holds: "Where a driver, acting contrary to express orders, invites a boy to ride on his wagon, which is started so suddenly that the boy is thrown off and injured, the employer is not liable for the injuries." The reason assigned for this holding is that the act of the driver in inviting the boy to ride, in violation of the rules of the company, was wholly outside the scope of the employment of the driver. To the same effect is *Rolfe v. Hewitt*, 125 N. E., 804. It is to be observed, however, that in the *Goldberg case, supra*, the question of habitual violation of the rule of the company was not mentioned or discussed, if such was a fact.

The whole proposition comes to this: If the driver was a mere laborer or hired man, employed to perform a simple and specific task, not reasonably requiring assistance as an incident to the performance of the task, and reasonable rules or regulations had been duly adopted by the owner and communicated to the driver, forbidding the employment of boys of tender age, and forbidding the driver to permit such boys to ride upon or get in or out of the wagon, then, if such rule was in force at the time of the injury, the plaintiff is not entitled to recover, because in so doing, under such circumstances, the driver was acting wholly without the scope of his employment. But if such rule had been expressly waived or abrogated, or if the rule had been openly, constantly or habitually violated for such length of time, that the employer in the exercise of ordinary care and diligence, knew or should have known of such habitual nonobservance, then the rule is deemed by law to have been waived or abrogated, and in such event the owner becomes liable for such negligence on the part of the driver.

The instruction complained of was correct as an abstract proposition of law, but it permitted the jury to determine whether or not the driver was acting within the scope of his employment without giving the de-

fendant the benefit of the rule which it had adopted to govern the conduct of its drivers with reference to employing the plaintiff or permitting him to be on or about the wagon, and the exception of the defendant to such instruction is sustained.

The defendant also excepted to the introduction of an ordinance of the city of Raleigh with reference to leaving any horse-drawn vehicle standing unattended. The exception to the introduction of this ordinance is sustained for the reason that there is no evidence in the present record warranting the application of the ordinance.

New trial.

JOSEPH F. CANNON AND MARTIN L. CANNON v. WISCASSETT MILLS COMPANY ET AL.

(Filed 31 January, 1928.)

1. Corporations—Dividends—When Directors Must Declare—Mandamus—Subjects for—Private Corporations.

Where under the provisions of C. S., 1178, the accumulated profits of a private corporation in excess of the working capital has been ascertained, the directors are without authority to carry it to the surplus fund, and upon the demand of the stockholders it must be distributed into dividends in accordance with the requirements of the statute, and mandamus will lie to compel such distribution.

2. Corporations—Dividends—Amount of, How Determined.

To preserve unimpaired the capital stock of a private corporation and to ascertain the amount that can be declared as dividends according to C. S., 1178, the surplus should be ascertained in the manner prescribed by taking the assets of the corporation according to their cash value, and, in the case of a manufacturing company, the further sum for depreciation should be taken into account. C. S., 1179.

3. Mandamus—Evidence Required Therefor—Appeal and Error—Remand—For Further Findings of Fact.

When proceedings in mandamus have been instituted by stockholders of a private corporation to compel the distribution of a surplus ascertained in accordance with the provisions of C. S., 1178, before the judge holding the terms of court of the district, C. S., 868, and the judge has issued a mandamus to compel the payment of the dividends without evidence of the actual cash value of the assets or taking into his consideration a proper deduction for the depreciation of the plant, the case will be remanded to him to be proceeded with according to law.

APPEAL by defendants from *Webb, J.*, at Chambers, on 9 April, 1927. Affirmed in part and remanded.

Action for writ of mandamus to compel defendant corporation and its board of directors to declare a dividend among its stockholders of the whole of its accumulated profits, exceeding the amount reserved for its working capital, and pay same to its stockholders, in accordance with the provisions of C. S., 1178.

From judgment directing that the writ of mandamus issue as prayed for by plaintiffs, and fixing the amount of accumulated profits of defendant corporation to be paid out as a dividend, defendants appealed to the Supreme Court.

Brooks, Parker, Smith & Wharton for plaintiffs.

J. Lee Crowell, R. L. Smith & Son, Brown & Sikes and Cansler & Cansler for defendants.

CONNOR, J. Defendant, Wiscassett Mills Company, is a corporation, duly organized under the laws of the State of North Carolina. It is engaged in business as authorized by its charter, in the town of Albemarle, in Stanly County, North Carolina. Its codefendants are directors of said corporation and constitute a majority of its board. Plaintiffs are stockholders of said corporation, and also members of its board of directors. The said corporation has been very successful in its business, and after paying dividends, both in cash and in stock, now has in its treasury, a surplus, made up of its accumulated profits.

The capital stock of said corporation is $3,600,000.00, all of which is now outstanding. At its regular annual meeting, held pursuant to its by-laws, in July, 1926, its stockholders, by resolution duly adopted, fixed as its working capital, to be set up and reserved out of its accumulated profits, the sum of $1,800,000.00. At a meeting of the board of directors, held immediately after the adjournment of the regular annual meeting of the stockholders, the action of the stockholders, in fixing a working capital for said corporation, was approved and ratified. The financial statement of the assets and liabilities of said corporation, as of 30 June, 1926, showed a surplus of $2,168,571.70. At this date no sum had been set up by the stockholders as a working capital. This financial statement was prepared by the treasurer of said corporation, and was submitted to the stockholders at their annual meeting for their information as to the financial condition of the corporation.

At the meeting of the board of directors, the following resolution was offered by the plaintiffs, or on their behalf:

"Resolved, that whereas this company has on hand and in its treasury accumulated profits not necessary or needful to be retained by the company to carry on the business for which said company is chartered and organized and in which it is engaged, such condition being evidenced

by the fact that this company has accumulated profits invested in low interest-bearing securities, to wit: United States Liberty Bonds, United States Treasury Certificates, Federal Land Bank Bonds, and Federal Farm Land Bank Bonds, for more than two million five hundred thousand dollars ($2,500,000.00),

"And, whereas, under the laws of the State of North Carolina, under which this company was chartered, organized and exists, the stockholders are entitled to have the accumulated profits of the corporation, above the amount in good faith fixed by the stockholders for working capital, paid out as dividends,

"And, whereas, under no circumstances can the surplus profits now in the hands of this corporation invested in the securities above named be required in good faith as working capital,

"Therefore, be it resolved, that the directors of this corporation do hereby declare a dividend upon the outstanding capital stock of this company in the sum of thirty-three and one-third per cent (33⅓%) and that said dividends be paid by delivering and transferring to the stockholders of this company the investments held by it in bonds and treasury certificates as hereinbefore enumerated in proportion as their stock holdings shall respectively entitle them."

Upon a record vote taken at said meeting of the board of directors, this resolution was not adopted. Thereupon, the following resolution was offered in behalf of plaintiffs:

"Resolved, that the officers of this company be directed to secure an appraisal of the property of this company, carried as inventory at its true market value, that the amount carried on the books as depreciation be reduced so as to represent the actual cash value depreciation of machinery."

Upon a record vote taken at said meeting of the board of directors, this resolution was not adopted.

Thereafter, the majority of the board of directors of defendant corporation, having declined and refused to declare a dividend among the stockholders of the whole amount of its accumulated profits, exceeding the amount reserved as a working capital as fixed by the stockholders, at their regular annual meeting, and thereafter approved by the board of directors, plaintiffs, as stockholders, on 12 February, 1927, began this action in the Superior Court of Stanly County by causing a summons to be issued therefrom returnable before his Honor, James L. Webb, judge of the Superior Court, regularly assigned to hold the courts of the Thirteenth Judicial District. C. S., 868.

Upon the hearing before Judge Webb, the parties appeared, and, as found by him, "through counsel, presented the facts as set out in the pleadings, and argued the case at length." No evidence was offered at

said hearing in support of the contentions of the parties with respect to the facts in controversy. The judge found the facts, from the pleadings, and after setting out such facts in full, rendered his judgment, as follows:

"It is, therefore, on motion of counsel for plaintiffs, ordered, adjudged, and decreed that a writ of mandamus issue against the defendant, Wiscassett Mills Company, and the directors thereof, commanding it and them, forthwith and without unreasonable delay, to declare a dividend among its stockholders of $1,495,694.40, accumulated profits of the corporation, which is in excess of the amount reserved by the stockholders, and approved by the directors, as a working capital and to be paid in capital of the corporation.

"It is further ordered, adjudged and decreed that the defendants pay the costs of this action."

To this judgment defendants excepted. They appealed therefrom to this Court, assigning numerous errors, as set out in the case on appeal.

The statute invoked by plaintiffs for their relief, upon the facts admitted in the pleadings is as follows:

"C. S., 1178. The directors of every corporation created under this chapter shall in January of each year, unless some specific time for that purpose is fixed in its charter or by-laws, and in that case at the time so fixed, after reserving over and above its capital stock paid in, as a working capital for the corporation, whatever sum has been fixed by the stockholders, declare a dividend among its stockholders of the whole of its accumulated profits exceeding the amount reserved, and pay it to the stockholders on demand."

This statute is clearly applicable in this action. A sum to be reserved as a working capital, out of the accumulated profits of the corporation has been fixed by the stockholders and approved by the directors. This sum, fixed at $1,800,000.00, added to the capital stock of the corporation—$3,600,000.00—makes $5,400,000.00. The financial statements prepared by the treasurer of the corporation and submitted to the stockholders and directors, show that the book value of the corporation's assets on 30 June, 1926, was $7,661,870.89, and on 31 December, 1926, was $7,490,903.04.

These assets are invested in machinery, real estate, inventory, notes and accounts, bonds and securities, and in bank balances. It clearly appears from admissions in the pleadings that after setting apart sufficient of these assets to represent and maintain the capital stock of the corporation, unimpaired, and after reserving from the accumulated profits the sum fixed by the stockholders and approved by the directors as a working capital, in accordance with the provisions of the statute, there remains a considerable sum which represents the accumulated

profits of the corporation, in excess of the working capital. Under the statute, upon demand of stockholders, it is the duty of the board of directors to declare a dividend among the stockholders of the whole of these accumulated profits, and pay the same to the stockholders. Plaintiffs, as stockholders, upon the facts admitted in the pleadings, have a right to require of the directors the performance of this statutory duty. By virtue of the statute, there is no discretion in the board of directors with respect to the performance of this duty. Plaintiffs cannot be held to be estopped by their conduct as alleged in the pleadings of defendants.

There is, therefore, no error in the judgment ordering and directing that a writ of mandamus issue, commanding the defendant, Wiscassett Mills Company and its directors, to declare a dividend among the stockholders of said company of the whole of its accumulated profits, exceeding the amount reserved out of the same as a working capital for said company. In that respect the judgment is affirmed.

There is sharp controversy between the plaintiffs and the defendants with respect to the amount of the accumulated profits of the defendant corporation at the date of the commencement of this action, available as the dividend to be declared and paid. In the complaint it is alleged:

"24. That the financial statement of the Wiscassett Mills Company as of 31 December, 1926, shows total assets of $7,490,303.04. That the directors at their semiannual meeting, held in January, 1927, declared a dividend to stockholders of $360,000.00, which deducted from the total assets leaves a balance of $7,130,903.04. That the amount fixed and reserved as a necessary working capital by the stockholders—$1,800,000.00—plus $3,600,000.00, the amount of capital stock, aggregates $5,400,000.00. That the difference between this and the total present assets of the company is $1,730,903.04, which under the law and the action of the stockholders at their last annual meeting, represents the accumulated profits which should be declared as a dividend among the stockholders of said corporation."

Answering this allegation, defendants say:

"24. That it is admitted that the financial statement of the defendant company as of 31 December, 1926, shows total assets of seven million four hundred ninety thousand, nine hundred three dollars and four cents ($7,490,903.04), and that the directors at their semiannual meeting held in January, 1927, declared the regular semiannual dividend of five per cent (5%), and an extra dividend of five per cent (5%), on the stock of said company which aggregated the sum of three hundred sixty thousand dollars ($360,000.00). It is admitted that the amount fixed and reserved as the necessary working capital by the stockholders at the annual meeting in July, 1926, was one million eight hundred thousand dollars ($1,800,000.00), and that the capital stock paid in was

three million six hundred thousand dollars ($3,600,000.00), which aggregates five million four hundred thousand dollars ($5,400,000.00). It is denied that the difference between said last mentioned amount and the total present assets of the company is one million seven hundred thirty thousand nine hundred three dollars and four cents ($1,730,903.04), or that said sum or any part thereof represents accumulated profits which should or could be declared as a dividend among the stockholders of said corporation. On the contrary it is averred that the item one million seven hundred thirty thousand, nine hundred three dollars and four cents is made up of the following:

Reserved for depreciation prior to 1 January, 1926	$1,391,088.12
Notes and accounts payable	46,978.64
Reserved for contingencies	23,152.10
Surplus	269,684.18
	$1,730,903.04

From which has been deducted the following items for the year 1926:

Depreciation on machinery, buildings, etc.	$ 134,311.07
Federal and State income taxes—estimates	62,000.00
	$ 196,311.07

Leaving an apparent surplus of seventy-three thousand three hundred seventy-three dollars and eleven cents ($73,373.11). Except as herein admitted paragraph 24 is denied."

No evidence was offered at the hearing before Judge Webb upon the issue thus raised by the pleadings as to the amount of the accumulated profits of defendant corporation, available as the dividend to be declared by the directors and paid by the corporation, other than the pleadings. With respect to this matter, the judge found the following facts:

"19. That the financial statement of the defendant corporation, submitted by the treasurer at the semiannual meeting of the stockholders in January, 1927, as of 31 December, 1926, shows that the inventory account had been increased from $701,879.97 to $1,030,861.21, and that after the payment of the regular and extra dividends declared at the annual meeting in July, 1926, the corporation still had invested in United States and Federal securities moneys not actually used in the operation of the mill to the extent of $1,495,694.40.

"20. The court finds as a fact that this sum, to wit: $1,495,694.40, invested and held by the corporation in unrelated securities from the

cotton manufacturing business, and bearing a low rate of interest, is accumulated profits in excess of the $1,800,000.00, reserved as a working capital of the corporation over and above its capital stock of $3,600,000.00 paid in."

Upon the foregoing findings of fact, it was ordered, adjudged and decreed that the directors declare a dividend among the stockholders of $1,495,694.40, this being the sum found by the court as the amount of the accumulated profits of the corporation available as a dividend, at the commencement of the action.

The findings of fact upon which the court fixed the amount of the dividend were made solely from the financial statement of the condition of the corporation's business as of 31 December, 1926. This statement shows as a liability of the corporation on said date the sum of $1,391,088.12, this being the amount reserved for depreciation in the value of the assets as shown in the statement. The total value of the assets shown in said statement is $7,490,903.04. In order to determine the amount of the accumulated profits available for the dividend, assuming that said values are correct for that purpose, there should be deducted from said sum the capital stock, the working capital, and all other liabilities of the corporation. If the amount reserved for depreciation is properly listed as a liability, it is manifest that the sum obtained by making the deduction of liabilities from the value of the assets will be much less than the sum fixed by the court as the amount of the dividend. The question is, therefore, presented whether in determining the amount of the accumulated profits to be declared and paid as a dividend, the amount shown in the statement as the reserve for depreciation should be considered as a liability, and therefore deducted from the value of the assets.

Manifestly, for the purpose of determining the amount to be declared and paid as a dividend, it is necessary that the true value of the assets, in cash, and not the mere book value, should be ascertained, for no dividend can be lawfully declared and paid except from the surplus or net profits of the business. C. S., 1179. The terms "net profits" or "surplus profits" have been defined as what remains after deducting from the present value of all the assets of a corporation the amount of all the liabilities, including the capital stock. 14 C. J., 802. In the instant case, in order to determine the amount available for the dividend, there must also be deducted the amount fixed by the stockholders and approved by the directors as the working capital. Neither the capital stock of the corporation, paid in and outstanding, nor its working capital, as fixed pursuant to the provisions of C. S., 1178, may be impaired by the payment of a dividend, under any circumstances. Both must be kept intact, and to that end, assets equal in value

to the amount of both the capital stock and the working capital—in this instance, $5,400,000.00—must be left and must remain in the treasury of the corporation after the payment of the dividend in accordance with the requirements of the statute.

Among the assets shown in the financial statement as of 31 December, 1926, which is the last statement appearing in the record of the financial condition of the corporation, prior to the commencement of this action on 12 February, 1927, are "Machinery," valued therein at $2,032,278.01, "Real Estate," valued therein at $1,421,345.69, "Inventory," valued therein at $1,030,861.21, and "Notes and Accounts," valued therein at $886,236.03. The remaining assets consist of United States Bonds, and Treasury Certificates, Federal Land Bank Bonds, and Federal Farm Land Bank Bonds, of the total value of $1,495,694.40 and of cash in banks, amounting to $624,487.70. The total value of the assets as shown in said statement is $7,490,903.04.

It does not appear from the pleadings how the values placed upon these various assets were determined—whether they are the present cash value, or the cost price of such assets. Nor does it appear therefrom, if such valuations are the cost price of the assets, whether or not there had been any depreciation in such values, and if so, how much. Nor does it appear from the pleadings how the amount reserved for depreciation was ascertained, whether the same was fixed arbitrarily, or after an appraisal. No evidence was offered with respect to these matters. In making its findings of fact, upon which it fixed the amount to be declared and paid as a dividend, the court evidently assumed that the valuations placed upon the assets in the financial statement dated 31 December, 1926, were true and correct and therefore did not consider, or take into account as a liability of the corporation the amount reserved for depreciation. In this there was error. If the financial statement, prepared for the information of the stockholders as to the condition of the company's business, is to be taken as correct for the purpose of determining the amount of accumulated profits available for a dividend, then, all the amounts shown therein, either as liabilities or as assets, should be accepted as true and correct. Otherwise, serious injuries to the corporation, its stockholders and creditors, may result from the payment of a dividend in such amount as to leave the capital stock and working capital impaired.

An issue is clearly raised upon the pleadings as to the amount of accumulated profits, in excess of the working capital, available for the dividend to be declared and paid out of the whole of such profits. This issue should be tried and determined before the amount of the dividend is fixed. Neither party to this action having moved for a trial of the issue by jury, the issue may be determined by the court. C. S., 868.

Upon the facts admitted in the pleadings, and as to which there is no controversy, plaintiffs are, by virtue of the statute, entitled to the relief demanded in this action. The interest of both stockholders and creditors, however, require that the capital stock of the corporation, and the amount fixed as its working capital shall not be impaired. Assets fully equal in value to the amount of the capital stock and working capital should be left in the treasury of the corporation, after the payment of the dividend. This action is remanded in order that further proceedings may be had in accordance with this opinion.

Affirmed in part and remanded.

M. L. BRASWELL, RECEIVER OF THE PERPETUAL BUILDING AND LOAN ASSOCIATION, v. R. A. MORROW ET AL.

(Filed 31 January, 1928.)

1. Negligence—Actions—Rights of Actions — Corporations — Officers — Duties and Liabilities.

Where the directors of a building and loan association are negligent of their duties and leave the management of its affairs in the hands of its secretary-treasurer, who, by maturing the stock at an earlier date than was safe, caused the association to become insolvent and finally to be placed in the hands of a receiver, and by other acts of mismanagement tending to the same result, and the directors by the observance of their duties should have been aware of the conditions existing: *Held*, a cause of action arises to the receiver upon a joint tort, in behalf of the stockholders and creditors of the corporation.

2. Torts—Joint Tort-Feasors—Liabilities—Release.

Joint *tort-feasors* cannot relieve one of their number from liability on a joint tort by executing a release to him.

3. Same—Receivers.

A release of one joint *tort-feasor* by the receiver of a corporation that has caused loss by the tortious act, in full settlement of all claims of whatsoever nature and kind that the corporation has against him (or his estate) is sufficiently comprehensive to include not only the personal liability of the one released, but of them all guilty of the joint tortious act, and when founded upon a sufficient consideration will so operate. The difference between a release and a covenant not to sue distinguished by BROGDEN, J.

CIVIL ACTION, before *Oglesby, J.*, at August Term, 1927, of UNION.

The plaintiff was duly appointed receiver of the Perpetual Building and Loan Association in August, 1923. The defendants, Morrow, Lee and Houston, were the directors of said building and loan association.

S. O. Blair was a director and died before the suit was brought, and his administrators are also defendants.

The plaintiff alleged that the Perpetual Building and Loan Association had for many years been engaged in the business of a building and loan association under the provision of the laws of North Carolina. B. C. Ashcraft was a director of the association at the time of his death, which occurred about 11 November, 1921. For many years prior to his death Mr. Ashcraft had been secretary and treasurer of the association. Paragraph four of the complaint is as follows: "That the defendants, as hereinbefore set out, entrusted and turned over the entire management of the association to B. C. Ashcraft, whom they elected and annually reëlected as secretary and treasurer of said association, and although they had, or by the exercise of ordinary care and prudence could have at any time had, information by the most superficial examination into the affairs of the association that the said secretary and treasurer was persistently pursuing a policy in the maturing of the stock of the association that would inevitably result in its insolvency, took no action to remedy the situation, but permitted the said secretary to continue the maturing of stock before it had reached maturity until the assets of the corporation were so depleted that its stock was valueless, and a receivership to wind up its affairs necessary."

Paragraph five of the complaint is as follows: "That the defendants knew, or by the exercise of ordinary care and prudence in the performance of their duties as directors should have known, that the secretary and treasurer was maturing the stock of the association before it reached par, that is, paying out one hundred dollars on each share of stock at the end of a period of time insufficient for it to have reached said value by the payment of the weekly dues of the stockholder, and although this action on the part of the secretary and treasurer was repeatedly called to the attention of the defendants in the annual audits of the affairs of the association by the auditors and accountants employed to perform such service, the defendants by this gross neglect of their duties and other acts of negligence and inattention to the affairs of the association, as will be hereinafter set out, permitted the association to become insolvent and the stockholders and creditors thereof to suffer loss and sustain damages as will be hereinafter more fully alleged."

Subsequent allegations of the complaint allege that the defendants as directors of said association failed to hold or attend meetings as required by law and the by-laws, "but permitted the entire business of the association to be managed, controlled and supervised by the secretary and treasurer, without any restraint or direction whatever from the directors." It was further alleged that the defendants as directors failed to require the treasurer to give a bond or to annually examine his books or to require him to keep a proper set of books, and that said de-

fendants negligently and carelessly permitted the secretary and treasurer to make loans on inadequate security and to fail to collect accrued interest upon loans made by the association.

It further appears from the record that on 12 December, 1923, the plaintiff, receiver, instituted an action against Scott-Charnley & Co., alleging in substance that the said Scott-Charnley & Co. were employed by the building and loan association to audit its books from time to time, and that said auditors carelessly and negligently failed to make a proper audit or to submit an accurate report of the condition of the association, and that "the officers and directors of said association, having no special training in work of this character, relied upon the correctness of the several reports made to them of the books by the defendant, as they had a right to do." In the complaint the plaintiff asked for $13,000 damage against Scott-Charnley & Co., which was the amount of the loss sustained by the association.

After the suit against the present defendants was instituted the plaintiff, as receiver, settled with Scott-Charnley & Co. for the sum of $1,043.

On 14 March, 1924, the plaintiff, as receiver of the Perpetual Building and Loan Association, brought a suit against Mary B. Ashcraft as administratrix of B. C. Ashcraft. No complaint was ever filed in this suit, but on 21 May, 1924, Mary B. Ashcraft, administratrix of B. C. Ashcraft, paid to the plaintiff as receiver the sum of $1,250, and took from him a release as follows: "Received from Mary Blair Ashcraft, administratrix of B. C. Ashcraft, deceased, the full and just sum of $1,250 in full settlement of all claims of whatsoever nature and kind that the Perpetual Building and Loan Association has against the said estate, and we hereby consent that said administratrix may be forever discharged, and furthermore agree to take a nonsuit in the action instituted against said estate. This 21 May, 1924. Perpetual Building and Loan Association. By M. L. Braswell, Receiver. By Vann & Milliken, Attorneys."

The receiver was examined as a witness. He testified that he presented a claim against the estate of Mr. Ashcraft, composed of various clerical errors made by him as secretary and for payment of installments that were entered on passbooks, but not recorded in the secretary's office. He further testified that the whole claim was denied by the Ashcraft estate. On cross-examination the receiver said: "I did not say that it was the same thing that I am now trying to collect out of these defendants. It may be a part of the same thing. I executed the receipt and release to the estate of B. C. Ashcraft."

Issues of negligence as to each director were submitted to the jury. These issues were answered against all the defendants except D. A. Houston, and damages were assessed at $6,000. The defendants tendered appropriate issues as to whether the release by the plaintiff of the

estate of Ashcraft and the settlement with Scott-Charnley & Co. operated as a release and discharge of the present defendants. The court refused to tender said issues and the defendants excepted.

Vann & Milliken for plaintiff.
John C. Sikes for defendants.

BROGDEN, J. The determinative question of law is this: Does a formal release of one director of a building and loan association, who was also secretary-treasurer and general manager thereof, discharge the other directors from liability for failure to perform their official duties? The law is: "Directors and managing officers of a corporation are deemed by the law to be trustees, or *quasi*-trustees, in respect to the performance of their official duties incident to corporate management, and are therefore liable for either wilful or negligent failure to perform their official duties. Therefore, if there is a loss of the corporation's assets, caused and brought about by the negligent failure of its officers to perform their duties, the corporation, or its receiver, in case of insolvency, can maintain an action therefor." "However, the officers of a corporation are not, as a rule, responsible for mere errors of judgment, nor for slight omissions from which the loss complained of could not have reasonably resulted." *S. v. Trust Co.,* 192 N. C., 246; *Besseliew v. Brown,* 177 N. C., 65.

A careful perusal of the complaint in this cause will disclose that the loss sustained by the corporation resulted from two primary causes: (a) The negligent failure of Ashcraft, the secretary and treasurer, and a director of the corporation, to properly perform his official duties, in that he was placed in sole and exclusive control of the management of the corporation, and carelessly and negligently failed to keep proper records or to make a proper accounting, and particularly that he carelessly and negligently matured the stock of the corporation which ultimately produced insolvency. (b) That the directors carelessly and negligently failed to supervise or restrain the said secretary and treasurer or to require the proper performance of his official duties.

It is apparent from the complaint that both Ashcraft and the other directors failed to perform positive duties imposed by law. Therefore, they coöperated in bringing about insolvency. Hence they are joint *tort-feasors.* This was the status of the parties when the plaintiff, receiver, brought a suit against the estate of Ashcraft, and this was also the status of the parties when the plaintiff executed and delivered for a valuable consideration the release of the estate of Ashcraft. The release states that the money is received "in full settlement of all claims of whatsoever nature and kind that the Perpetual Building and Loan Asso-

ciation has against the said estate." This language is comprehensive and inclusive. The plaintiff insists that the release covered only items due by Ashcraft to the corporation as secretary and treasurer, arising from errors made by him and collections which he had not turned over to the corporation, but the paper-writing, upon its face, purports to cover "all claims of whatsoever nature and kind." This language not only includes amounts collected by Ashcraft and not accounted for, but also his liability as a director for negligent failure to perform his official duties. This Court has declared in *Howard v. Plumbing Co.,* 154 N. C., 224, that: "It is well settled that a release of one or more joint *tort-feasors* executed in satisfaction for an injury is a discharge of them all, on the ground that the party can have but one satisfaction for his injury." *Brown v. Louisburg* 126 N. C., 701; *Burns v. Womble,* 131 N. C., 173; *Smith v. R. R.,* 151 N. C., 479; *Gregg v. Wilmington,* 155 N. C., 23; *Sircey v. Rees' Sons,* 155 N. C., 296. The legal effect of a formal release is quite different from a covenant not to sue. A covenant not to sue one joint *tort-feasor* or one coöbligor does not have the effect of releasing other *tort-feasors* or coöbligors. *Sandlin v. Ward,* 94 N. C., 496; *Mason v. Stephens,* 168 N. C., 370. Therefore, when the plaintiff, as receiver, released Ashcraft for a valuable consideration, this release, under the law, inures to the benefit of the other directors, and the plaintiff is not entitled to recover.

The plaintiff contends, however, that the suit brought by him against the estate of Ashcraft was intended to charge Ashcraft as secretary and treasurer in failing to account for money which he had received and failed to pay into the treasury. As no complaint was filed, this fact does not appear from the record; but, conceding that the plaintiff intended the suit against Ashcraft to cover such items alone, the fact remains that the release given contains language which covers all liability, whether arising upon contract or tort. The plaintiff relies upon *Besseliew v. Brown,* 177 N. C., p. 65. This case involved the mismanagement of a building and loan association. It appeared that the secretary, who had been entrusted with complete charge and management of the company, had embezzled over $12,000 of the assets, thus causing insolvency. The directors had accepted a mortgage for $6,000 of the shortage and thereafter canceled this mortgage upon receipt of the sum of $3,000. No question of a formal release was involved in the case. Indeed, *Hoke, J.,* in referring to accepting $3,000 in payment of a mortgage debt of $6,000, said: "This may have been a mere error of judgment on their part, or it may have been the best course to take under the circumstances presented, but we fail to see how it could inure to the protection of defendants, except in reduction of the damages, if any, that may be shown against them, and this effect is allowed

it in the complaint." It also appears in the *Brown case, supra,* that the directors themselves settled with Hammond, the defaulting secretary. Certainly, joint *tort-feasors* cannot relieve themselves from liability by making a settlement with or releasing one of their own number. In the present case the release was executed by the receiver, who was an officer of the court and charged with the duty of protecting the interests of stockholders and creditors. The case of *Slade v. Sherrod,* 175 N. C., 346, relied upon by the plaintiff, is not applicable for the reason that there were two separate and distinct causes of action involved, and the release, upon its face, purported to settle only one of said causes of action, leaving the other to be determined according to law.

Upon the whole record, and after a careful consideration of the merits of the appeal, we are of the opinion that the plaintiff is not entitled to recover.

Reversed.

J. E. OWENS v. WAKE COUNTY AND EDGAR D. PEEBLES ET AL., MEMBERS OF THE BOARD OF COUNTY COMMISSIONERS.

(Filed 31 January, 1928.)

1. Statutes—Repeal and Revival—Municipal Finance Act—Schools.

When a statute excludes a certain county from issuing bonds for public school purposes, without the approval of the voters thereof, and such statute is amended by a subsequent Legislature so as to allow this county to issue the bonds without the approval of the voters, and a general municipal finance act is passed, generally approving the authority of counties to issue such bonds without the approval of the voters, with the provision that its repealing clause should not affect any local act, but should be in addition thereto: *Held,* the authority of the particular county to issue bonds for the designated purpose, a necessary expense, without submitting the question to its voters for their approval, is valid.

2. Counties—Governmental Agencies—Taxation—Nature and Extent of Power—Schools—Municipal Finance Act.

The provisions of Article VII, sec. 7, requiring the approval of the voters for the issuance of bonds that are not for a necessary expense, applies to local matters relating to the affairs of the county separately considered, and not to a State-wide system of education, in which the counties are acting as governmental agencies for the carrying out of the entire scheme, made mandatory by our Constitution, Art. IX, secs. 1, 2, 3, requiring the maintenance of a six months term of public schools.

3. Counties—Taxation—Necessary Expense—Highways.

While the building of highways, with bridges, culverts, etc., are recognized county necessaries, a general or special statute requiring the approval of the voters in order to a valid issue of bonds for that purpose, is necessary to be observed.

OWENS *v.* WAKE COUNTY.

APPEAL by plaintiff from *Sinclair, J.,* at Chambers, 1 November, 1927. From WAKE. Modified and affirmed.

Controversy without action upon the following facts:

1. On 9 August, 1927, the board of county commissioners of Wake County adopted a resolution or order authorizing the issuance of $400,000 of bonds of said county for erecting and equipping schoolhouses and acquiring land therefor. On the same date the said board also adopted a resolution or order authorizing the issuance of $30,000 of bonds of said county for highway construction or reconstruction, including bridges and culverts.

Publication of the said two bond orders or resolutions has not yet been completed, as provided in section 19 of the County Finance Act. Neither of the said bond orders or resolutions has been submitted to the voters of Wake County, nor has the question of issuing any of the bonds provided for in the said bond orders or resolutions been submitted to the voters of Wake County. The defendants will proceed as promptly as possible to issue all of the bonds referred to in the said bond orders and resolutions, without submitting the said bond orders to the voters of Wake County and without submitting to the voters of Wake County the question of issuing any of the bonds referred to in said bond orders and resolutions, unless the defendants are restrained by an order of this Court, or unless a petition or petitions by voters of said county, demanding that one or both of the said bond orders be submitted to the voters, shall be made and filed in accordance with the provisions of section 21 of the County Finance Act.

2. The proceeds of said $400,000 bonds referred to in Exhibit A will be used for the erection and acquisition of schoolhouses, school sites and school equipment in Wake County, which are required for the establishment and maintenance of the State system of public schools, in accordance with the provisions of the Constitution of North Carolina.

3. On 9 March, 1925, the General Assembly of North Carolina enacted an act, known as chapter 509 of the Public-Local Laws of 1925, in words and figures as follows:

"AN ACT MAKING IT UNLAWFUL FOR WAKE COUNTY TO ISSUE BONDS EXCEPT THOSE BONDS AUTHORIZED BY THE 1925 GENERAL ASSEMBLY.

"The General Assembly of North Carolina do enact:

"Section 1. That from and after the ratification of this act the board of county commissioners of Wake County shall have no authority to issue bonds or otherwise create a bonded indebtedness on behalf of said county unless said proposed issue of bonds shall have been approved by

a vote of the qualified electors of Wake County, or unless the issue of said bonds has been authorized by the one thousand nine hundred and twenty-five General Assembly.

"Sec. 2. That all laws and clauses of laws in conflict with the provisions of this act are hereby repealed.

"Sec. 3. That this act shall be in force from and after its ratification.

"Ratified this the 9th day of March, A.D. 1925."

4. On 2 March, 1927, the General Assembly of North Carolina enacted an act, known as chapter 276 of the Public-Local Laws of 1927, in words and figures as follows:

"AN ACT TO AMEND CHAPTER 120, PUBLIC LAWS, EXTRA SESSION, 1924, SO AS TO INCLUDE WAKE COUNTY.

"The General Assembly of North Carolina do enact:

"Section 1. That section one of chapter one hundred twenty, Public Laws, Extra Session, one thousand nine hundred twenty-four, be amended by striking out the word 'Wake' in line thirty-two between the words 'Vance' and 'Warren.'

"Sec. 2. That all laws and clauses of laws in conflict with this act are to the extent of such conflict hereby repealed.

"Sec. 3. That this act shall be in force from and after its ratification.

"Ratified this the 2d day of March, A.D. 1927."

Chapter 120 of the Public Laws of 1924, Extra Session, which was amended by said chapter 276, of the Public-Local Laws of 1927, so as to make said act of 1924, applicable to Wake County, expressly authorized certain counties, not including Wake County, to issue bonds for school buildings "without submitting the issue to a vote of the people." As originally enacted, the act of 1924 applied to only three counties. It was amended from time to time, or attempted to be amended, so as to make it applicable to twenty-five counties, but a number of the amendatory acts were not passed in the manner required by the Constitution of North Carolina, for the passage of acts authorizing counties to issue bonds. The original act of 1924, and also the act of 1927, making it applicable to Wake County, were, however, duly passed in the manner required by the Constitution for the passage of acts authorizing counties to issue bonds.

The plaintiff prayed that the defendants be restrained and enjoined from issuing the proposed bonds or any of them. It was adjudged that the defendants be not restrained or enjoined from issuing any of said bonds, and that the defendants recover their costs. The plaintiff excepted and appealed.

Bunn & Arendell for plaintiff.
Leroy L. Massey for defendants.

ADAMS, J. The two orders set forth in the statement of facts were made pursuant to certain provisions of the County Finance Act. Public Laws 1927, ch. 81. The first purports to authorize county bonds in the amount of $400,000 to be used for the purpose of building schoolhouses in the county; and the second, to authorize county bonds in the amount of $30,000 to be applied in the construction of highways, culverts, and bridges. The question of contracting these debts has never been submitted to the qualified voters of the county. Constitution, Art. VII, sec. 7.

In 1925 the General Assembly passed an act depriving the board of commissioners of Wake County of all authority to issue bonds or otherwise to create a bonded indebtedness on behalf of the county unless the debt was approved by a vote of the qualified electors of the county. Public-Local Laws 1925, ch. 509. The plaintiff contends that this act prohibited the defendants from issuing either class of the proposed bonds; the defendants contend that it was repealed by the County Finance Act. The relevant clauses of section 43 are as follows: "All acts and parts of acts, whether general, special, private or local authorizing or limiting or prohibiting the issuance of bonds or other obligations of a county or counties, are hereby repealed: . . . *Provided further,* that nothing herein contained shall have the effect of repealing any act now in force, or enacted by the General Assembly of one thousand nine hundred and twenty-seven, requiring the question of issuing bonds by any county to be submitted to a vote of the people." Public Laws 1927, ch. 81. The act of 1925 was in force when the County Finance Act was passed and was saved from repeal by the express terms of the proviso. The statement in *Hartsfield v. Craven County,* 194 N. C., 358, in regard to the effect of this repealing clause on the local act referred to therein must be considered in connection with the facts in that case. There all the bonds were to be issued for funding or refunding valid indebtedness incurred before the first day of July (Public Laws 1927, ch. 81, secs. 8(j), 9(e) 1), not for a new debt then to be contracted. Moreover, the larger part of the outstanding debt had been contracted for necessary expenses, the local act authorizing the payment of existing indebtedness incurred for such purpose (Public-Local Laws 1923, ch. 609); and the remainder of the outstanding debt had been incurred for school purposes within the principle to which we shall hereafter refer. See *Comrs. v. Assell,* 194 N. C., 412.

Although the act of 1925, *supra,* is effective, the order authorizing bonds in the sum of $400,000 for the purpose of erecting and furnish-

ing schoolhouses in Wake County is not for this reason invalid, but may be upheld. This conclusion rests upon two grounds:

1. In 1924 the General Assembly conferred upon county commissioners authority, in their discretion, without submitting the issue to a vote of the people, to borrow money for erecting or repairing buildings in which to carry on schools for a term of six months. Public Laws, Extra Session, 1924, ch. 120. Wake and several other counties were excepted. In the County Finance Act it was provided that the repealing clause should not affect any local or private act enacted at the session of 1927, but that the powers thereby conferred and the procedure therein provided should be deemed an addition to and not a substitution for those conferred by the local act. The act of 1924, *supra,* was amended at the session of 1927 by striking Wake from the counties named in the proviso, and all conflicting laws were repealed. Public-Local Laws 1927, ch. 276. If the first clause of section 43 the County Finance Act repealed the act of 1924 as to all the other counties, the authority of the commissioners of Wake was not thereby destroyed, because the Legislature, conforming to the second proviso in section 43, expressly amended the act of 1924 and continued it in force as a local act applicable to Wake County. We do not accede to the plaintiff's position that the repeal of the original act of 1924 necessarily carried with it all amendments, for the amendment of 1927 was expressly exempted from the effect of the repealing clause.

2. It may be noted that no petition for a referendum was filed under section 21 of the County Finance Act; but it is provided in section 9(e)2 that if the bonds are for a purpose other than the payment of necessary expenses, the order shall take effect when approved by the voters of the county. The plaintiff says that the erection of schoolhouses is not a necessary expense within the meaning of Art. VII, sec. 7, of the Constitution, and that the approval of the qualified voters is a condition precedent to the issuance of the bonds. *Hollowell v. Borden,* 148 N. C., 255; *Lacy v. Bank,* 183 N. C., 373.

Counties, cities, and other municipal corporations may establish or maintain schools when authorized to do so by special acts of the General Assembly; and in such cases Art. VII, sec. 7, is applicable to bonds issued and the taxes levied to pay them. It is otherwise as to the maintenance of a general and uniform system of public schools, for which the counties may issue bonds and levy taxes, not as municipal corporations organized for the purpose of local government, but as administrative agencies of the State employed to discharge a duty imposed by the Constitution. In *Lacy v. Bank, supra,* it is said: "The restrictions contained in Art. VII, sec. 7, which prohibits counties, cities, and towns, and other municipal corporations from contracting debts or levying

taxes except for necessary expenses unless approved by a majority of the qualified voters therein, must be understood to refer to debts and taxes in furtherance of local measures and do not extend to a State-wide measure of the instant kind, undertaken in obedience to a separate provision of the Constitution, and in which counties are, as stated, expressly recognized as the governmental units through which the general purpose may be made effective." Constitution, Art. IX, sec. 3; *Collie v. Comrs.*, 145 N. C., 170; *Board of Education v. Comrs.*, 150 N. C., 116; *Board of Education v. Comrs.*, 174 N. C., 469; *Board of Education v. Comrs.*, 178 N. C., 305. The subject has recently been considered and the controlling principle clearly stated in an opinion delivered by *Connor, J.*, in *Frazier v. Comrs.*, 194 N. C., 49, cited and approved in *Hall v. Comrs.*, 194 N. C., 768, and his full review of the authorities makes unnecessary any further citation. The principle, as he points out, antedates the County Finance Act; and, in accordance with this principle the definition of "necessary expenses" given in section 2, as the Court said in *Lacy v. Bank, supra,* must be understood to refer to local measures and not to those undertaken in obedience to the mandatory requirements of sections 1, 2, and 3 of Art. IX of the Constitution. It is admitted in the statement of facts that the bonds in question are required for the establishment and maintenance of the State system of public schools in accordance with the foregoing provisions.

We find no sufficient objection to the proposed bonds for the purchase of land and the erection of schoolhouses; but the act of 1925, *supra,* is a direct inhibition against issuing the bonds for road construction unless they are approved by the voters of the county. The construction of highways, culverts and bridges involves necessary expense, and ordinarily legislative permission to issue bonds for this purpose is sufficient. *Smathers v. Comrs.*, 125 N. C., 487; *Swinson v. Mt. Olive,* 147 N. C., 611. But general or special legislation which provides that a proposition to incur an indebtedness or to issue bonds for a given purpose shall be submitted to the voters, amounts in law to a statutory restriction, and such indebtedness shall not be incurred unless the measure is approved by the voters, although it is classed as a necessary expense. *Comrs. v. Webb,* 148 N. C., 120; *Hendersonville v. Jordan,* 150 N. C., 35; *Ellison v. Williamston,* 152 N. C., 147.

As to the bonds for schoolhouses the judgment is affirmed; the issuance of those proposed for road construction should have been enjoined. As thus modified the judgment is affirmed.

Modified and affirmed.

ORA INGRAM AND HER HUSBAND, R. D. INGRAM ET AL. v. JOHN PLOTT ET AL.

(Filed 31 January, 1928.)

Trials—Instructions—Applicability to Pleadings and Evidence—Appeal and Error—Undue Influence.

In an action based upon undue influence and other issues as to whether the intestate by deed intended to divide his lands among his sons, and his personalty among his daughters, charging his sons certain amounts of money, as evidenced by their notes payable to him, but to be used for the benefit of his daughters, the matter is one to be determined by the jury according to the evidence and under proper instructions, and an instruction that the matter was one of adjustment of the rights of the parties by the court and jury, etc., and that the notes, being payable to the estate, would be distributed equally among the sons and daughters, virtually cutting out the daughters from a share of the estate, and that the jury were to consider this upon the question of undue influence, when the sons had waived their rights in the personalty, is reversible error.

APPEAL by defendants from *Stack, J.*, at May Term, 1927, of HAYWOOD. New trial.

Action to have certain deeds executed by the father of plaintiffs and defendants, since deceased, by which lands described therein were conveyed to defendants, set aside and declared null and void, for that the execution of same was procured by fraud and undue influence, and for other relief.

The issues submitted to the jury were as follows:

"1. Was the execution of the deeds by Montraville Plott to the defendants, on 9 March, 1920, procured by the undue influence of the defendants, or either of them, as alleged in the complaint? Answer: .....

"2. If not, was it the intention of the said Montraville Plott that the lands conveyed by said deeds in excess of $2,000 each should be advancements to the defendants, as alleged in the amended complaint? Answer: .....

"3. What was the reasonable market value of the lands conveyed to defendants on 9 March, 1920, subject to the life estate of the grantors? Answer: .....

"4. What was the reasonable market value of the timber on said lands, which was reserved during the life of Montraville Plott on 9 March, 1920? Answer: .....

"5. Were said deeds executed upon the understanding and agreement that the defendants would accept the lands therein conveyed as their share of the estate of Montraville Plott, and that the plaintiffs should be paid the notes out of the sale of the timber described in the complaint as their share thereof? Answer: .....

"6. If so, was said understanding and agreement entered into with the fraudulent intention on the part of the defendants at the time that the same should never be complied with and performed by them, as alleged in the complaint? Answer: ....."

The jury having answered the first issue "Yes," under the instructions of the court, did not answer the remaining issues. The first issue, with the affirmative answer thereto, was accepted by the court as the verdict.

From judgment on this verdict defendants appealed to the Supreme Court.

Alley & Alley, Morgan & Ward, M. G. Stamey and Rollins & Smathers for plaintiffs.

A. Hall Johnson and Hannah & Hannah for defendants.

CONNOR, J. Plaintiffs, Ora Ingram, Emma Hyatt, Kowa Medford, Lona Roels and Una Plott, are daughters of Montraville Plott and his wife, Mrs. Julia Plott; all of said plaintiffs are or have been married, except Una Plott. Defendants, John Plott, George Plott, Ellis Plott, Samuel Plott and Vaughn Plott, are their sons. Montraville Plott died on or about 27 November, 1924. He left surviving his widow, Mrs. Julia Plott, and said sons and daughters, as his heirs at law. He died intestate.

On 9 March, 1920, and for many years prior thereto, the said Montraville Plott was the owner and in possession of certain lands situate in Haywood County, North Carolina. On said date the said Montraville Plott and his wife executed three deeds, by which they conveyed to their sons, named in said deeds, respectively, as grantees, the lands described therein. Each of said deeds was filed for registration in the office of the register of deeds of Haywood County, on 21 June, 1920, and was thereafter duly recorded. The consideration recited in each of said deeds, for the conveyance of land described therein to each of said sons, is $4,000, $2,000 of which was an advancement to said sons; each of said sons was required to pay the remaining $2,000 in cash, as evidenced by his note payable to Montraville Plott. A life estate in all of the lands conveyed by said deeds was reserved therein to Montraville Plott and his wife, Julia Plott. The timber on said lands was also reserved to Montraville Plott, for and during his life. These deeds were prepared by an attorney upon instructions given to him by the said Montraville Plott. After they were executed, they were retained in the possession of said attorney, under the instructions of said Montraville Plott, until each grantee had executed the note, evidencing part of the purchase price for the land conveyed to him. The said deeds were then filed for

registration by the said attorney, in accordance with the express instructions of the said Montraville Plott.

There was evidence tending to show that at the time said deeds were executed the said Montraville Plott expressed the opinion that his lands were then worth about $20,000, and that it was his purpose to give his said lands at his death to his five sons, and to give to his five daughters, all of whom, except his daughter Una, were or had been married, the sum of $10,000, this being the total amount of the notes which he required his said sons to execute as part of the consideration for said deeds.

In the original complaint filed in this action plaintiffs alleged "that the execution of each and every one of the foregoing deeds of conveyance was procured through the undue and fraudulent influence and coercion of the said defendants (other than Samuel C. Plott), and that by reason of the aforesaid fraudulent and undue influence and coercion in the execution of said deeds, the same, and each of them became and was fraudulent and void."

They further alleged therein "that the defendants (other than Samuel C. Plott), by fraudulent collusion among the said defendants and the parties to whom the deeds were delivered in escrow, fraudulently, wrongfully and unlawfully procured the possession of the said deeds set out in the next preceding paragraph hereof, and said deeds were wrongfully and unlawfully caused to be put to record as hereinbefore set out, on the records of deeds of Haywood County, and upon the death of the said Montraville Plott the said defendants (other than Samuel C. Plott) wrongfully went into possession of said lands described in their several said deeds, and are now in possession of said lands, claiming title under and through said deeds."

Said allegations are denied in the answer filed by defendants (except Samuel C. Plott and his wife). It is admitted, however, that the male defendants, and each of them, are in the rightful possession of the lands described in their deeds, and have been in such possession since the date of their execution.

In an amendment to the complaint filed by leave of court during the trial, plaintiffs alleged that "said deeds were made with a distinct understanding and agreement that the same should be held in escrow until the notes hereinbefore mentioned should be paid, and the timber so reserved should be sold, and until the proceeds of said notes and timber should be paid to the plaintiffs herein; and that the defendants (other than Samuel C. Plott) at the time said deeds were executed, and prior thereto, and thereafter agreed to abide by the aforesaid division of the said estate, and to accept the lands conveyed by said deeds as their full share of said estate, respectively, and in like manner at the time

aforesaid agreed that said deeds should be held and remain in reserve, and that they should not be delivered to them and placed on record until after the aforesaid notes had been collected and the said timber sold and the proceeds thereof paid to plaintiffs."

In answer to the said amendment to the complaint, the answering defendants say that said amendment "is totally false and untrue in its entirety, and these answering defendants therefore deny the same, and in this connection adopt their former answer in reply to each and every allegation contained in said amended complaint."

In their further answer to the original complaint defendants say:

"That on and prior to 9 March, 1920, Montraville Plott, the father of the *feme* plaintiffs and the male defendants herein, while of considerable age, was hale and hearty, and held and retained his full mental vigor; that at said time and prior thereto it was and had been his intention that his sons, to wit, the male defendants herein, should have, possess and hold all of the real estate of which he was then seized, and that the girl children, to wit, the five plaintiffs herein, should have and receive in lieu of any interest in real estate that he, the said Montraville Plott, may own, the sum of $2,000 each; that the said Montraville Plott as aforesaid was a man of strong mind, and these answering defendants are advised and believe, conceived his own plan of dividing his estate as aforesaid, without the knowledge, consent, request or persuasion of any of the defendants herein, and certainly and most positively without the knowledge, consent, request or persuasion of any of these answering defendants, but pursuant to his own plan employed an attorney at law of high standing and reputation to draw the deeds referred to in the complaint."

Defendants further say in their answer to the original complaint that each of them is ready, able and willing to pay his note, now held by the administrator of their father; that there are no creditors of their father's estate, and that the plaintiffs are and ought to be entitled, in law and equity, to the proceeds of said notes, subject to such interest, if any, as their mother, as widow of Montraville Plott, may have in and to such proceeds.

There are thirty-six assignments of error set out in the record on this appeal. We do not deem it necessary to discuss or to decide whether all of these assignments of error should be sustained or not, in view of our decision with respect to assignment based upon the exceptions to the charge to the jury.

The court charged the jury as follows:

"Gentlemen of the jury, this is an action by certain plaintiffs, the daughters of Mr. Montraville Plott, against the defendants, who are his sons, to adjust the rights of the parties in the property of their father.

That is what you and I, and the lawyers and the officers of the court are trying to do—to ascertain the rights of the parties and adjust them."

Defendants excepted to this instruction, and assign same as error.

The court further charged the jury as follows:

"That is to say, gentlemen of the jury, a man can do with his property whatever he desires to do with it; he can cut out part of his children and give it all to part of them; he can cut out all, if he wishes to, and give the property to a stranger, if that is what he wants to do. Nothing else appearing, the presumption is that every parent intends equality among his children; that they love them all alike, but if a man has sufficient reason and desires to do so, he can dispose of his property, either by will or by deed, as he pleases, regardless of whether it is just or meets with your or my approval."

Defendants excepted to this instruction and assign same as error.

The court further charged the jury as follows:

"You may consider, gentlemen of the jury, that those who were injured had no opportunity to be present and that it was made in their absence. You may consider that the deeds to all the land had the effect to cut out the plaintiffs in the real estate of their father as bearing upon the question of whether he would have made an unequal distribution of his property if he had had the exercise of his own free will. That is a circumstance which you may consider as bearing upon whether or not undue influence was exercised upon Mr. Plott."

Defendants excepted to this instruction and assign same as error.

The court further charged the jury as follows:

"Something has been said about a tender of $2,000 to the plaintiffs in the answer of the defendants, but the tender in the answer is made subject to the right of the administrator and administratrix. The court instructs you that the rights of the administrator and administratrix are that they are the owners of the notes and have the right to recover in full the amount of the notes, the notes not being made payable to the girls, but to the father, and not being paid off in his lifetime, it goes to his legal representatives to enforce payment, and that when collected the proceeds would pass under the statutes of distribution, five-elevenths going to the boys and five-elevenths going to the girls, and one-eleventh to the mother. The court instructs you that that is the way it would be divided. The notes are payable to Montraville Plott, and if not collected in his lifetime they are to be collected by his administrator and administratrix."

Defendants excepted to this instruction and assign same as error.

In view of the allegations in the answers of defendants, and of evidence offered at the trial tending to sustain these allegations, defendants' assignments of error, based upon exceptions to the foregoing instruc-

tions, must be sustained. These instructions were prejudicial to defendants, especially when they are considered in connection with the colloquy which had taken place during the trial and in the presence of the jury between the court and counsel for defendants. Defendants excepted to the questions and comments of the court, tending to show that, in the opinion of the court, if the first issue should be answered by the jury "No," plaintiffs would receive no part of their father's estate under the division made by him, as alleged by defendants. Defendants, in their answer, as distributees of their father's estate, had ratified this division, and thereby waived their rights, as such distributees; they could not, of course, bind their mother, the widow of the deceased, with respect to her rights. Defendants had also alleged that there were no debts to be paid by the administrator out of the estate. There was evidence, sustaining this allegation. Indeed, there was no contention to the contrary. The intestate died in 1924, and this action was tried in 1927. It was not the function of the court and jury to adjust the rights of the parties to the action in the property of their father. It was the duty of the jury to sit together, hear the evidence pertinent to the several issues submitted to them, and to render their verdict accordingly. It was the duty of the court to adjudge the rights of the parties, according to the verdict. The prejudicial error in the instruction, first excepted to by defendants, was not cured by the general principles upon which the other instructions are based. These instructions are not applicable to the facts which the uncontradicted evidence upon the trial tend to establish.

Defendants earnestly insist that other assignments of error appearing in the record should be sustained. As we are of the opinion that defendants are entitled to a new trial for the errors in the instructions to the jury, we do not deem it necessary to pass upon these assignments of error. For the errors in the charge to the jury, there must be a

New trial.

IN RE NELLIE BARTLETT CHASE.

(Filed 31 January, 1928.)

1. States—Relationship—Force of Judgments of Other States—"Full Faith and Credit."

While under our government the states of the United States retain their individual sovereignties, and without special constitutional or valid legislative provisions to the contrary the judgments of each State are to be regarded in the courts of every other State as foreign judgments having no extra-territorial effect, except, that as modified by the Federal Consti-

tution, they shall be given full faith and credit as to their judicial proceedings, etc., and as modified by Congress under the power to prescribe by general laws the manner in which they be proved and the effect thereof.

2. Same.

By the Federal Constitution with the statutory provisions relating thereto the judgments of the courts in each State are given the same conclusive effect, as records, in all the states as they had at home, and though it does not make them domestic judgments in the other states, to all intents and purposes, it does give them general validity, faith and credit as evidence in the courts.

3. Guardian and Ward—Foreign and Ancillary Guardianship.

Where under proceedings duly had in another State under an inquisition for lunacy, a person has been declared insane and a guardian of his person and property has been therein had, and in the exercise of the authority thus derived, the guardian has had his ward confined in an asylum in this State as being best suited to the cure and well being of his ward: *Held*, our courts in recognition of the Federal comity laws may, as a matter of comity, uphold here the relationship of guardian and ward, and the exercise of the guardian's reasonable judgment in confining his ward in the private institution of our State, there being nothing contrary to our public policy, good morals or natural justice or against our statute or organic law in so doing.

4. Insane Persons—Guardianship—Rights of Foreign Guardians in This State.

The proceedings in another State declaring a person insane is a determination of status, and when such proceeding is according to the law of the other State, the status, as declared, will usually be upheld in this State, as a matter of general recognition.

APPEAL by Charles W. Bartlett, guardian of Nellie Bartlett Chase, from *Shaw, J.*, at June Term, 1927, of BUNCOMBE. Reversed in part.

The cause was brought to this Court at the Spring Term of 1927 by *certiorari* to review a judgment which denied Mrs. Chase's petition for her discharge from a hospital in Asheville on a writ of *habeas corpus*. 193 N. C., 450. The facts with regard to her detention appear in the record of that proceeding. In May, 1926, in an inquisition of lunacy instituted in the county judge's court of Dade County, Florida, it was judicially determined that Mrs. Chase was insane; that she was not indigent, and that she should be delivered to the care and custody of her brother, Charles W. Bartlett, "to be admitted to a private hospital for care, maintenance and treatment." Charles W. Bartlett was duly appointed by the same court guardian of her person and of her estate. He brought his ward to North Carolina and put her in a private hospital in Asheville for treatment. Thereafter a writ of *habeas corpus* was sued out on her behalf, and at the hearing, in addition to the foregoing facts, it was found that she could not be discharged and allowed her liberty

Without endangering her own safety and the safety of others. After the argument here, the cause was remanded for the purpose of obtaining a definite adjudication of the question whether the petitioner was unlawfully restrained of her liberty. It was said in the opinion that if it should be adjudged that her confinement is unlawful and that she is insane a temporary order might secure her safety pending further proceedings.

The cause was afterwards heard before Judge Shaw, and upon full investigation he adjudged that the petitioner is insane and should be restrained; that the proceedings in the county judge's court of Dade County, Florida, were legal and entitled to full faith and credit in that State so far as the adjudication of insanity and the appointment of the guardian were concerned, but that the guardian was without authority to have custody of his ward in this State or to commit her to a hospital here for treatment; and that she be discharged from the custody of her guardian, but should be detained in the Appalachian Hall in Asheville pending further orders of the court. The guardian excepted and appealed.

Wells, Blackstock & Taylor and Joseph W. Little for petitioner.
Mark W. Brown for guardian, appellant.

ADAMS, J. In *Buckner v. Finley,* 2 Peters, 586, 7 Law Ed., 528, it is said: "For all national purposes embraced by the Federal Constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In other respects the states are necessarily foreign to and independent of each other. Their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions." Although forming a confederated government the states retain their individual sovereignties, and without special constitutional or legislative provision the judgments of each State would be regarded in the courts of every other State as foreign judgments. It was upon this theory and in strict accord with it that provision was made for giving in the courts of each State full faith and credit to the public acts, records, and judicial proceedings of every other State and authorizing the Congress to prescribe by general laws the manner in which such acts, records, and proceedings shall be proved, and the effect thereof. Fed. Const., Art. IV, sec. 1. The statute prescribing the mode in which the records and judicial proceedings of the courts of any State shall be proved provides that the records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken. R. S.,

sec. 905; U. S. Compiled Sts., sec. 1519. That is, this act, in connection with the constitutional provision, gives to the judgments of each State the same conclusive effect, as records, in all the States as they had at home; it does not make the judgments of other States domestic judgments to all intents and purposes, but it gives them general validity, faith and credit as evidence in the courts. *Mills v. Durgee,* 7 Cranch, 481, 3 Law Ed., 411; *Thompson v. Whitman,* 18 Wallace, 457; 21 Law Ed., 897; Story's Conflict of Laws, sec. 609; Cooley's Principles Const. Law, 185. But the record is conclusive evidence only of the matter adjudged. "It must be obvious, when the Constitution declared that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State, and provides that Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof, that the latter clause, as it relates to judgments, was intended to provide the means of giving to them the conclusiveness of judgments upon the merits, when it is sought to carry them into judgments by suits in the tribunals of another State. . . . The judgment does not carry with it into another State the efficacy of a judgment upon property or persons, to be enforced by execution." *M'Elmoyle v. Cohen,* 13 Peters, 312, 324, 10 Law Ed., 177, 183.

In view of this principle it should be observed that by suing out the writ of *habeas corpus* the petitioner did not seek to enforce the judgment given by the court in Florida, in the sense of carrying it into a judgment in this State. Nor did she assail it as being ineffective in the domestic jurisdiction. The basis of her petition is the alleged unlawful restraint of her person in North Carolina under a judgment which was rendered in another State and which, she contends, has no extra-territorial force. With exceptions due to clauses in the Federal Constitution each of the States is regarded as a legal unit; but under the provision that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States" (Art. IV, sec. 2), the petitioner had the right to contest the legality of her detention by the writ of *habeas corpus.* Cooley's Principles Const. Law, 187.

The procedure in Florida determined the petitioner's status, and status is usually a matter of general recognition. The condition of her mind was ascertained by the method prescribed in the first volume of the Florida Compiled Laws Annotated. Sec. 1200 sets forth the requisites of the petition; sec. 1201, the duty of the judge, and of the examining committee who, before proceeding, must secure the presence of the supposed insane person, and thereafter make a report; and sec. 1203, the duty of the court after due consideration of the report made by the examining committee. If the person is found to be insane the court

shall so adjudge or decree. The clause providing that such person shall be delivered to the Florida Hospital for the Indigent Insane is qualified by the provision that if any responsible person offer to assume the care and custody of a harmless person without cost to the State or county the court, in its discretion, may make an order to this effect. It was accordingly decreed that Mrs. Chase should be delivered to the care and custody of her brother, Charles W. Bartlett, to be admitted to a private hospital for care, maintenance and treatment. She was thereupon carried to Asheville and admitted into a private hospital.

The position of the guardian is, not that he has attempted to change the domicile of his ward, but has sought the best available agency for effecting her cure, and that the decree of the Florida court, if without extra-territorial effect, should be upheld under the doctrine of comity between the States.

It is important to recall the fact that the respondent is the petitioner's only guardian; the rights of opposing guardians, resident and foreign, are therefore not involved. And it may be granted that as a rule the authority of the respondent will be regarded as limited to the State in which he was appointed guardian. *Pennoyer v. Neff,* 95 U. S., 714, 24 Law Ed., 565; *Hoyt v. Sprague,* 103 U. S., 613, 631, 26 Law Ed., 585, 592; *Morgan v. Potter,* 157 U. S., 195, 39 Law Ed., 670. Ordinarily a guardian cannot, as the assertion of a legal right, transfer the power to control the person of his ward beyond the limits of the sovereignty from which his authority was derived; still there is a sense in which the power conferred by his appointment may follow the petitioner's person. *Townsend v. Kendall,* 4 Minn., 77 A. D., 534. While the appointment by the Florida court cannot *ex proprio vigore* have any extra-territorial force or operation, effect may be given it by way of comity. The guiding principle is stated in the words of *Chief Justice Bigelow:* "It is the duty of the courts of this State, in the exercise of that comity which recognizes the laws of other States when they are consistent with and in harmony with our own, to consider the status of guardian which the petitioner holds under the laws of another State as an important element in determining with whom the custody of the child is to continue. It would not do to say that a foreign guardian has no claim to the care or control of the person of his ward in this commonwealth. If such were the rule, a child domiciled out of the State, who was sent hither for purposes of education, or came within the State by stealth, or was brought here by force or fraud, might be emancipated from the control of his rightful guardian, duly appointed in the place of his domicil, and thus escape or be taken out of all legitimate care and custody. But in such cases the foreign guardian would not be regarded here as a stranger or intruder. His appointment in another State as guardian of an infant,

with powers and duties similar to those which are by our laws vested in guardians over the persons of their wards, would entitle him to ask that the comity of friendly states having similar laws and usages should be so far recognized and exerted as to surrender to him the infant, so that he might be again restored to his full rights and powers over him, by removing him to the place of his domicil. And if it should appear that such surrender and restoration would not debar the infant from any personal rights or privileges to which he might be entitled under our laws, and would be conducive to his welfare and promote his interests, it would be the duty of the court to award to the foreign guardian the custody of the person." *Woodworth v. Spring,* 86 Mass., 321.

While comity is a rule of practice and not a rule of law, it has substantial value in securing uniformity of decision; it does not command, but it persuades; it does not declare how a case shall be decided, but how with propriety it may be decided. It is more than mere deference to the opinion of another, for by virtue of the doctrine rights acquired under a statute enacted or a judgment rendered in one State will be given force and effect in another, if not against public policy; and as pointed out in *R. R. v. Babcock,* 154 U. S., 190, 38 Law Ed., 958, to justify a court in refusing to enforce a right which accrued under the law of another State, because against the policy of our laws, it must appear that it is against good morals or natural justice, or that for some other such reason the enforcement of it would be prejudicial to the general interests of our own citizens. 11 C. J., 1236; *Emory v. Greenough,* 3 Dall., 369, 1 Law Ed., 640; *Bank v. Donnally,* 8 Peters, 361, 8 Law Ed., 974; *The China v. Walsh,* 7 Wall., 53, 19 Law Ed., 67. And this is a matter which each State must decide for itself. *Finney v. Guy,* 189 U. S., 335, 47 Law Ed., 839.

We find nothing in our own laws which declares it against public policy, good morals, or natural justice to recognize as a matter of comity the judgment given in the Florida Court, on which the petitioner was admitted into a private hospital in this State for cure, maintenance, and treatment. If a court of chancery may assist a guardian in compelling his ward to go to a school outside his State (2 Story's Eq. Jur., sec. 1340; *Townsend v. Kendall, supra; Woodworth v. Spring, supra),* why may it not as a matter of comity give countenance and approval to the admittance of an insane ward into a private hospital outside his State? The petitioner is yet insane. On the former hearing Judge Schenck found as a fact that the respondent is the petitioner's only close relative, and that he has acted for the best interest of the petitioner in causing her to be confined for treatment; and it is said in the appellant's brief that Judge Shaw expressed the same opinion. At any rate, there is no finding that he is not fit and suitable for the position of guardian.

As we understand, Judge Shaw discharged the petitioner on the ground that the judgment of the Florida court, of itself, has no operation outside the limits of that State. If this proposition of law be granted, it does not operate to prevent the application of the doctrine of comity, upon which our decision is made to rest.

So much of the judgment as declares that the respondent is without authority as guardian to have the custody of the petitioner in North Carolina or to commit her to a private hospital herein, and that she be discharged from his custody as guardian, is reversed, and the relation heretofore existing between the respondent and the petitioner as guardian and ward is restored. In other respects the judgment is affirmed.

Reversed in part.

GRADY SHEETS, LAURA SHEETS, AND LAURA SHEETS, GUARDIAN OF JAMES SHEETS, v. J. G. FLYNT TOBACCO COMPANY AND H. C. SHEETS.

(Filed 31 January, 1928.)

1. Guardian and Ward—Care of Ward's Estate—Liability of Guardian.

In the investment of funds belonging to his ward, the guardian is not liable for a loss to the estate by reason only that he has not followed the statutory directions in making the investments, if he has exercised a sound discretion commensurate with his duties, and good faith upon inquiry, and caution, to the interest that the *corpus* of the estate be preserved and a reasonable income, as required by law, be provided for his ward; and when the statutory requirements as to the kind and nature of the investments has been followed, to attach a personal liability on him, or liability on his surety, it must be made to appear that he acted in fraud or gross negligence in respect to the duties the law imposes on him.

2. Guardian and Ward—Care of Ward's Estate—Liability of Third Parties—Primary and Secondary Liability.

The liability of a guardian for an investment of funds of his ward in the preferred stock of a private corporation, is primary, and must be established before a judgment against the corporation for selling the stock and accepting payment with the knowledge that the guardian had therein wrongfully used funds belonging to the ward's estate.

APPEAL by defendant, J. G. Flynt Tobacco Company, from judgment of *Finley, J.*, at February Term, 1927, of FORSYTH. Reversed.

Action to recover of defendant company a sum of money received by it from the guardian of plaintiffs as the price of preferred stock purchased by said guardian as an investment of funds in his hands, belonging to plaintiffs as his wards.

From judgment of Superior Court, affirming the judgment of the county court of Forsyth County, defendant Tobacco Company appealed to the Supreme Court.

Fred M. Parish for plaintiffs.

Hastings & Booe and Manly, Hendren & Womble for defendant Tobacco Company.

Richmond Rucker for defendant H. C. Sheets.

CONNOR, J. This action was begun in the county court of Forsyth County on 2 February, 1926. In their complaint filed in said court plaintiffs demand judgment that they recover of defendant, J. G. Flynt Tobacco Company, the sum of $9,000, with interest thereon from 2 June, 1921.

After the complaint was filed, upon motion of defendant Tobacco Company, H. C. Sheets was made a party defendant. No judgment or relief against said defendant was demanded by plaintiffs; the Tobacco Company, however, in its answer to the complaint alleged "that if there is any liability accruing against any one on account of the matters and things set out in the complaint, it is the liability in the first instance of said H. C. Sheets." At the close of the evidence on the trial in the county court, upon his motion for judgment as of nonsuit, the action was dismissed as to defendant, H. C. Sheets. Upon the verdict, and upon admissions made in the pleadings and during the trial, judgment was rendered that plaintiffs recover of defendant, J. G. Flynt Tobacco Company, the sum of $9,000, with interest thereon from 2 June, 1921. It was stipulated, however, by and between the parties that this judgment should be credited with the sum of $1,890, this being the total amount of the dividends on the preferred stock of defendant company, issued to and held by H. C. Sheets, guardian of plaintiffs, which were paid by said company to said guardian from 2 June, 1921, to 1 February, 1924. This stipulation is incorporated in the judgment. Defendant, H. C. Sheets, duly accounted for said dividends paid to him by defendant Tobacco Company.

It appears from admissions made in the pleadings that on 2 June, 1921, H. C. Sheets, father of plaintiffs, each of whom was at said date an infant, was their guardian. He had in hand, as such guardian, the sum of $9,000, in cash, which sum he had received as part of the estate of his wards, each being entitled to one-third thereof. For the purpose of investing said sum, in order that he might receive therefrom an income for his wards, he purchased, as guardian, of defendant, J. G. Flynt Tobacco Company, a corporation, organized and doing business under the laws of the State of North Carolina, ninety shares of its pre-

ferred stock, of the par value of $9,000; he paid for said shares of stock the sum of $9,000, using for that purpose the money in his hands belonging to the estate of his wards; he caused the certificates for said shares of stock to be issued to him as guardian. The defendant, J. G. Flynt Tobacco Company, sold said shares of stock to H. C. Sheets, received from him the said sum of $9,000, and issued to him as guardian the certificate for same, with knowledge that H. C. Sheets was guardian of plaintiffs, and that he had purchased said stock as such guardian, as an investment of funds in his hands belonging to his wards. Dividends declared on said stock were paid by said company to said H. C. Sheets, as guardian. The last dividend was paid on or about 1 February, 1924. Since said date the business of said defendant company has not prospered, and at the commencement of this action said preferred stock was not worth par.

The plaintiffs, Grady Sheets and Laura Sheets, became of age in 1924; thereafter, H. C. Sheets, without contest on his part, was removed as guardian of James Sheets, who has not yet arrived at the age of twenty-one, and Laura Sheets was duly appointed as his guardian. Thereafter, on 2 February, 1926, plaintiffs began this action to recover of defendant, J. G. Flynt Tobacco Company, the sum of $9,000, with interest from 2 June, 1921.

Plaintiffs contend that they are entitled to recover said sum of said defendant, for that their guardian, H. C. Sheets, was without power or authority as such guardian to invest funds belonging to them in the purchase of preferred stock of said company; that said company knew that said guardian was without such power or authority and received and now holds said sum without any right or title to same; and that plaintiffs, upon surrender of said certificate of stock, are now entitled to recover of said company said sum with interest thereon from the date of its receipt.

Defendant contends that the guardian had the power and authority to invest said sum in the purchase of its preferred stock and that such purchase was made in good faith and after due diligence on the part of the guardian; that if such purchase was made without good faith or without due diligence on the part of said guardian, said defendant was without knowledge of such lack of good faith or due diligence. Other matters in defense of plaintiffs' right to recover in this action are set up in the answer.

The judge presiding at the trial in the county court, after the pleadings had been read, and before any evidence had been offered, stated that he was of opinion that the purchase by the guardian of stock of defendant company, as an investment of funds in his hands as guardian, was unlawful, for that such investment was not authorized by statute in

North Carolina, and was in violation of principles of law applicable to such investments. It is conceded that there is no statutory authority in this State for the investment of guardian funds in the stock of a private corporation; it is contended, however, by defendant that such investments are not prohibited, either by statute or by any general principles applicable to investments by guardians. In accordance with the Court's opinion as stated above, the first and second issues were submitted to the jury, as determinative of plaintiff's right to recover in this action. The Court declined to submit issues tendered by defendant company, presenting matters relied upon by said defendant, in its answer as defenses to plaintiff's right to recover in this action. Defendant's assignments of error, based upon exceptions to the issues submitted and to the refusal to submit the issues tendered by it, were not sustained on its appeal to the Superior Court, and the judgment of the county court was affirmed. In this, defendant on its appeal to this Court from the judgment of the Superior Court, contends that there was error, for which the judgment of the Superior Court should be reversed to the end that a new trial in the county court may be ordered.

We have thus presented for decision by this Court as the preliminary question involved in this appeal, whether a guardian who has in hand funds belonging to his ward, which he is required by law to invest, is authorized to invest such funds in the purchase of stock of a private corporation. This question does not involve, in the first instance, the further question as to whether a guardian who has made such an investment is liable for losses resulting from an unwise or improvident investment in such stock. He may be held liable for such losses, although he had authority to purchase the stock, as guardian, and to pay for same with guardianship funds. The fact that he has made an investment of such funds, which he was authorized to make, does not relieve him of liability for losses sustained by reason of such investment, if in making the particular investment he failed to act in good faith and with due diligence.

A guardian is generally authorized to make any investment of funds in his hands, belonging to his ward, which, in his best judgment, arrived at in good faith and after the exercise of due diligence, will secure the principal of said fund, and yield a reasonable income therefrom for the benefit of his ward's estate. All that can be, and all that should be required of him, in making any investment is that he shall conduct himself faithfully, and shall, at the time, exercise a sound discretion. The principle stated in *Harvard College v. Amory,* 26 Mass., 446, and approved generally by the courts of this country, is fair to the guardian and just to the ward. "He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to specula-

tion, but in regard to permanent disposition of their funds, considering the probable income as well as the safety of the capital to be invested." In support of this principle, it is said in the opinion in that case: "Trustees are justly and uniformly considered favorably, and it is of great importance to bereaved families and orphans, that they should not be held to make good losses in the depreciation of stocks or the failure of the capital itself, which they hold in trust, provided they conduct themselves honestly, and discreetly and carefully, according to the existing circumstances, in the discharge of their trusts. If this were held otherwise, no prudent man would run the hazard of losses, which may happen without any neglect, or breach of good faith." Guardians are not liable as insurers of investments made by them, whether such investments are made with or without statutory authority, or with or without express approval of the court having jurisdiction in the premises.

It is well settled that a guardian and the sureties on his bond are liable to his ward for all moneys collected or received by him as such guardian, and not properly accounted for on the final settlement of the guardianship. *Loftin v. Cobb,* 126 N. C., 58. He is liable not only for the principal sums collected or received by him as guardian, but also for interest or a reasonable income from such sums. In *Gary v. Cannon,* 38 N. C., 64, *Ruffin, C. J.,* says: "It is the duty of a guardian to keep the ward's money at interest and on good security; and that, under the penalty of being answerable for compound interest, if he will not reasonably endeavor to make it, and for the debt, if he allows it to remain on insufficient security. The Court, therefore, never undertakes to decide to whom a guardian shall lend money, nor how long he shall lend to a particular person. The investments are in the guardian's discretion, as they are upon his responsibility." For any loss or losses sustained by his ward's estate, by reason of investments made of guardian funds by the guardian, resulting from a breach of his duty with respect to such investments, the guardian and the sureties on his bond are liable.

Inasmuch as the law imposes upon a guardian the duty to invest funds in his hands, belonging to his ward, it must follow that the guardian has power and authority, with respect to making investments, commensurate with this duty. In the exercise of this power and authority, conferred upon him in order that he may perform his duty, the guardian is and should be held to a high degree of diligence and good faith. In *Cobb v. Fountain,* 187 N. C., 335, it is said: "As a general rule, a guardian may discharge himself at the termination of his trust by turning over to the person lawfully entitled thereto whatever securities he may have taken in good faith as a result of the prudent management of his ward's estate."

An investment of guardianship funds, made by a guardian may be challenged by the ward or person entitled thereto upon a final settlement, upon the ground that such investment was not made in good faith and in the exercise of due diligence, unless such investment was expressly authorized by statute or by order of court obtained prior to the making of the investment. If the investment was made under statutory authority, or pursuant to an order of court, the guardian cannot be held liable for losses resulting therefrom, in the absence of fraud or gross negligence. In the case of investments not so expressly authorized, the good faith and due diligence of the guardian may be challenged, and if successfully challenged, he will be held liable for any and all losses resulting from the investment. Good faith and due diligence on the part of the guardian, however, will protect the guardian and the sureties on his bond, from liability for losses.

In accordance with the foregoing principles, we must hold that there was error in refusing to sustain defendant's assignments of error based upon its exceptions to the issues submitted and to the refusal of the county court to submit issues as tendered upon the trial in said court by defendant, and in affirming the judgment of said court.

If there is any liability to plaintiffs for losses sustained by them from the investment of their funds in the preferred stock of defendant company, such liability is primarily that of their guardian. If such investment was made by him without good faith and without the exercise of due diligence, he and the sureties on his bond are primarily liable for such losses. Whether the defendant Tobacco Company in any event can be held liable for such losses, must be determined after all the facts in controversy have been established. The defendant Tobacco Company is entitled to a new trial in the county court, and to that end the judgment of the Superior Court must be

Reversed.